The Constitutional Argument for the Disestablishment of Marriage

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While this article is a stand alone piece, it draws, in part, from my forthcoming book entitled *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity* (Cambridge University Press 2013). A draft of that manuscript is available here:


Any and all comments are welcome
Disestablishment of Marriage

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Marriage is more than the legal or tangible benefits, burdens, and responsibilities that accompany it. After all, this is why gays and lesbians do not simply seek civil union status. Civil unions are not the same as marriage. Marriage is a morally special status that provides some kind of intangible benefit that civil unions do not. The constitutional and scholarly debate over same-sex marriage is a debate about whether gay couples may avail themselves of the status of marriage, an issue that the Court will consider in its 2013 term. This Article places this debate within the larger question of whether marriage laws themselves are constitutional. Recent work in liberal political theory suggests that a commitment to anti-perfectionism or liberal neutrality rules out marriage. Anti-perfectionism contends that laws and policies are illegitimate if based on particular moral or religious premises. In particular, such laws rest on a perfectionist belief about what kind of life is intrinsically worthwhile, a belief that anti-perfectionism or liberal neutrality rules out. Scholarly work suggests that a putative liberal state disestablish marriage—it get out of the marriage “business,” precisely because marriage laws rest on such premises or beliefs.

Yet, there is no sustained treatment of whether the Constitution demands as much. This Article fills this scholarly gap arguing that once we take seriously the distinction between civil unions and marriage alongside the unconstitutionality of prohibitions on same-sex marriage, marriage laws themselves turn out to be unconstitutional. The state should disestablish marriage. That is, the state should stop marrying individuals, stop deploying the label of marriage. This Article argues that constitutional law has, in part, accepted certain features of liberal neutrality or anti-perfectionism. And in doing so, it has doomed both bans on same-sex marriage and the institution of marriage itself. There are four distinct doctrinal approaches to the claim that prohibitions on same-sex marriage are unconstitutional: a fundamental right to marry approach, a suspect class equal protection approach, a rational review equal protection approach, and the Establishment Clause. In elucidating these approaches this Article draws from recent cases striking down prohibitions on same-sex marriage including, Perry v. Schwarzenegger (N.D. Cal. 2010), the first federal court to do so.

1 By “marriage” this Article only means civil marriage, the state’s deployment of the civil institution of marriage.

2 The Court has granted certiorari in two cases, Hollingsworth v. Perry (reviewing the Ninth Circuit’s decision invalidating Proposition 8, California’s ban on same-sex marriage); United States v. Windsor (reviewing the Second Circuit’s decision in validating the Defense of Marriage Act).

3 704 F.Supp. 2d 921 (N.D. Cal. 2010)
Disestablishment of Marriage

If the equal protection rational review and Establishment clause approaches succeed in invalidating prohibitions on same-sex marriage, these approaches also suggest that marriage laws themselves are unconstitutional. In particular, the Article argues that marriage is based on one of possibly four constitutionally illegitimate rationales: the tradition of marriage, the religious underpinning of marriage, the morally superior status of marriage, or animus against unmarried individuals. The fact that constitutional law deems these kinds of reasons inadmissible in justifying legislation informs, in part, a commitment to anti-perfectionism or liberal neutrality. This Article suggests that there is some synergy between liberal neutrality and constitutional jurisprudence, something that has gone largely unnoticed by scholarly work. And the state cannot avoid the disestablishment of marriage by appealing to possible economic or welfare reasons to justify the institution. While such reasons may explain civil unions, they do not explain the state’s insistence on deploying the all-important label of marriage. Again, as the same-sex marriage debate makes clear, civil unions are not the same as marriage. Moreover, appeal to a fundamental right to marry is inapplicable as this right is relevant only where the state limits marriage not where marriage is disestablished. With no marriage statute, there is no state action to challenge. The Article concludes by suggesting there is a powerful tension between constitutional objections to prohibitions on same-sex marriage and a constitutional defense of the institution of marriage itself. Either prohibitions on same-sex marriage are unconstitutional along with marriage itself or marriage is constitutional along with prohibitions on same-sex marriage. We cannot have it both ways.

This Article is in three parts. Part I elucidates the tenets of liberal neutrality or anti-perfectionism explaining why marriage laws are inconsistent with them. Part II analyzes the various constitutional arguments against prohibitions on same-sex marriage. Part III argues that, if taken seriously, some of these arguments doom marriage itself.
Disestablishment of Marriage

The Constitutional Argument for the Disestablishment of Marriage

Table of Contents

Introduction

I. Liberal Neutrality and the Disestablishment of Marriage
   A. Public Justification and Anti-Perfectionism
      i. Conception of the Good
      ii. Justificatory Constraint on Lawmaking
      iii. Requirement of Good Faith
   B. Difference Between Marriage and Civil Union or Domestic Partnership
      i. Marriage as Status: Debate over Same-Sex Marriage
      ii. Intangible Benefit of Marriage
         1. Morally Special Status
         2. Religious Underpinning
   C. Label of Marriage Violates Liberal Neutrality

II. Why Prohibitions on Same-Sex marriage are Unconstitutional
   A. Constitutional Right to Marry Approach
   B. Equal Protection Approach
      i. Suspect Class/Classification and Heightened Scrutiny
      ii. Rational Review
         1. Reasons that are Circular or Proffered in Bad Faith
            a. Maintain Marriage just for Opposite Sex Couples
            b. Child Rearing and Responsible Procreation
            c. “Catchall” Reason
         2. Illegitimate or Inadmissible Reasons
            a. Mere Tradition
            b. Mere Moral Superiority
            c. Animus
   C. The Establishment Clause Approach

III. Why Marriage itself is Unconstitutional under Rational Review and/or the Establishment Clause
Disestablishment of Marriage

A. Reasons that are Circular or Proffered in Bad Faith
   i. Maintain Marriage in order to Maintain Marriage
   ii. Child Rearing /Responsible Procreation Inapplicable
   iii. Any Possible Catchall Secular Purpose Only Explains Civil Unions not Marriage

B. Only Illegitimate Purposes Remain
   i. Tradition of Marriage
   ii. Religious Status of Marriage
   iii. Morally Special Status of Marriage
   iv. Animus against Unmarried Individuals

C. Constitutional Right to Marry Approach is Inapplicable

D. Constitutional Violation versus Remedy

Conclusion
Disestablishment of Marriage

The Constitutional Argument for the Disestablishment of Marriage

Introduction

Marriage is more than the legal or tangible benefits, burdens, and responsibilities that accompany it. After all, this is why gays and lesbians do not simply seek civil union status. Civil unions are not the same as marriage. Marriage is a morally special status that provides some kind of intangible benefit that civil unions do not. The constitutional and scholarly debate over same-sex marriage is a debate about whether gay couples may avail themselves of the status of marriage, an issue that the Court will consider in its 2013 term. This Article places this debate within the larger question of whether marriage laws themselves are constitutional. Recent work in liberal political theory suggests that a commitment to anti-perfectionism or liberal neutrality rules out marriage. Anti-perfectionism contends that laws and policies are illegitimate if based on particular moral or religious premises. In particular, such laws rest on a perfectionist belief about what kind of life is intrinsically worthwhile, a belief that anti-perfectionism or liberal neutrality rules out. Scholarly work suggests that a putative liberal state disestablish marriage—it get out of the marriage “business,” precisely because marriage laws rest on such premises or beliefs.

Yet, there is no sustained treatment of whether the Constitution demands as much. This Article fills this scholarly gap arguing that once we take seriously the distinction between civil unions and marriage alongside the unconstitutionality of prohibitions on same-sex marriage, marriage laws themselves turn out to be unconstitutional. The state should disestablish marriage. That is, the state should stop marrying individuals, stop deploying the label of marriage. This Article argues that constitutional law has, in part, accepted certain features of liberal neutrality or anti-perfectionism. And in doing so, it has doomed both bans on same-sex marriage and the institution of marriage itself. There are four distinct doctrinal approaches to the claim that prohibitions on same-sex marriage are unconstitutional: a fundamental right to marry approach, a suspect class equal protection approach, a rational review equal protection approach, and the Establishment Clause. In elucidating these approaches this Article draws from recent cases striking down prohibitions on

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If the equal protection rational review and Establishment clause approaches succeed in invalidating prohibitions on same-sex marriage, these approaches also suggest that marriage laws themselves are unconstitutional. In particular, the Article argues that marriage is based on one of possibly four constitutionally illegitimate rationales: the tradition of marriage, the religious underpinning of marriage, the morally superior status of marriage, or animus against unmarried individuals. The fact that constitutional law deems these kinds of reasons inadmissible in justifying legislation informs, in part, a commitment to anti-perfectionism or liberal neutrality. This Article suggests that there is some synergy between liberal neutrality and constitutional jurisprudence, something that has gone largely unnoticed by scholarly work. And the state cannot avoid the disestablishment of marriage by appealing to possible economic or welfare reasons to justify the institution. While such reasons may explain civil unions, they do not explain the state’s insistence on deploying the all-important label of marriage. Again, as the same-sex marriage debate makes clear, civil unions are not the same as marriage. Moreover, appeal to a fundamental right to marry is inapplicable as this right is relevant only where the state limits marriage not where marriage is disestablished. With no marriage statute, there is no state action to challenge. The Article concludes by suggesting there is a powerful tension between constitutional objections to prohibitions on same-sex marriage and a constitutional defense of the institution of marriage itself. Either prohibitions on same-sex marriage are unconstitutional along with marriage itself or marriage is constitutional along with prohibitions on same-sex marriage. We cannot have it both ways.

This Article is in three parts. Part I elucidates the tenets of liberal neutrality or anti-perfectionism explaining why marriage laws are inconsistent with them. Part II analyzes the various constitutional arguments against prohibitions on same-sex marriage. Part III argues that, if taken seriously, some of these arguments doom marriage itself.

I. Liberal Neutrality and the Disestablishment of Marriage

Recent work in liberal political theory argues that marriage laws are inconsistent with a commitment to anti-perfectionism or liberal neutrality. Anti-perfectionism contends that laws and policies are illegitimate if based on particular moral or religious premises. Anti-perfectionism contends that laws and policies are illegitimate if based on particular moral or religious premises. In particular, such laws rest on a perfectionist belief about what kind of life is

\[\text{704 F.Supp. 2d 921 (N.D. Cal. 2010)}\]
Disestablishment of Marriage

intrinsically worthwhile, a belief that anti-perfectionism or liberal neutrality rules out. Scholarly work suggests that a putative liberal state disestablish marriage—it get out of the marriage “business,” precisely because marriage laws rest on such premises or beliefs. This Article outlines anti-perfectionism situating it in the context of liberal political theory. Appreciating the distinction between marriage and civil union reveals why marriage is inconsistent with this strand of liberalism.

A. Public Justification and Anti-Perfectionism

The principle of public reason or justification is a familiar one. John Rawls famously suggests that “the limits imposed by public reason” apply to “constitutional essentials and questions of basic justice.” The Supreme Court, according to Rawls, is an “exemplar” of public reason. As Rawls puts it: “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideas acceptable to them as reasonable and rational.” This is not about some actual consensus but what reasonable individuals would accept. This commitment to public reason excludes those justifications that cannot in principle be accepted by all.

One variant of this principle of public justification is a commitment to anti-perfectionism or liberal neutrality, a commitment that holds the state ought to remain neutral among competing conceptions of the good life. Howard Schweber provides a powerful defense of this kind of public reason or what he calls “public justification.” Such a theory of justification requires that


8 Rawls, supra note 7, at 214

9 Rawls, supra note 7, at 216

10 Rawls, supra note 7, at 217
democratic citizens proffer reasons that one’s fellow listener could accept. This kind of justificatory constraint rules out those reasons from the realm of law making that do not meet this principle.\textsuperscript{12} This version of public reason contends that conceptions of the good life are illegitimate justificatory grounds for state legislation. That is, the state may not pass laws and policies grounded in the belief that a particular way of life is intrinsically better than another. These beliefs are perfectionist ones, because they point to what counts as a decent or virtuous existence. They seek to articulate how we as individuals can live more perfect lives. Precisely because individuals may disagree over the inherent worthiness of certain ways of living over others, such beliefs are not in principle shareable by all. Liberal neutrality eschews them. It is about what is right not what is good.

The principle of anti-perfectionism or liberal neutrality is the more familiar interpretation of justificatory liberalism. Theorists such as Bruce Ackerman, Charles Larmore, John Rawls, and Lawrence Solum endorse this approach.\textsuperscript{13} Lawrence Solum calls this approach an “exclusionary” account of public reason or public justification. It is “exclusionary” because it does not permit all justifications to count as legitimate.\textsuperscript{14} It deems those reasons that invoke a conception of the good non-public. Ronald Den Otter powerfully expounds upon this “exclusionary” approach by arguing that it is “the best interpretation of an ideal of public justification.”\textsuperscript{15}

There are three distinct but interrelated components of anti-perfectionism or liberal neutrality: one, conceptions of the good life are not a morally legitimate basis for lawmaking; a two, this constraint is a justificatory one; and three, it requires that government not proffer justificatory reasons in bad faith.

\textbf{i. Conception of the Good Life}

John Rawls defines a conception of the good as what “is valuable in human life.”\textsuperscript{16} This is a belief about what counts as a good, appropriate, or


\textsuperscript{13} See, e.g., Ackerman, Larmore, Rawls, supra note 7 and Solum, supra note 12.

\textsuperscript{14} Solum, supra note 12.

\textsuperscript{15} Den Otter, supra note 12, at 139.
Disestablishment of Marriage

worthwhile life.

Thus, a conception of the good normally consists of more or less determinate scheme of final ends, that is, ends we want to realize for their own sake. . . .

A conception of the good is a belief about privileging a certain way of living over another for its own sake. It is about what kind of life has “intrinsic or inherent value.” Often, these conceptions of the good are based on religious or moral doctrines. Anti-perfectionism contends that these conceptions are illegitimate grounds for state legislation. Given the pluralistic nature of

16 Rawls, supra note 7, at 19.

17 Rawls, supra note 7, at 19.


For instance, there is an interpretation of this justificatory enterprise that endorses a commitment to perfectionism. Theorists such as Joseph Raz, George Sher, and Steven Wall, see supra, argue that a liberal state may indeed appeal to particular conceptions of the good life to justify laws and policies. Although these accounts vary in the degree to which a state may invoke perfectionist beliefs, they generally point to the permissibility of legislation that rests on the idea that certain ways of living are intrinsically more valuable than others. One salient strand of this kind of perfectionism is Christopher Eberle’s argument that religious rationales ought indeed to suffice as a legitimate basis for lawmaking see supra Eberle and Perry. Eberle argues that forcing those who are religious to bracket their perfectionist reasons is unfair. Doing so fails to treat them as equal citizens.

But recent scholarly work seeks to defend liberal neutrality from these and other criticisms, see e.g., MATTHEW CLAYTON, Justice and Legitimacy in Upbringing. (Oxford
democratic bodies, a liberal state must not privilege one such conception over another. The state may not pass laws and policies grounded in the belief that a particular way of life is \textit{intrinsically} better than another. These beliefs are perfectionist ones, because they point to what counts as a decent or virtuous existence. They seek to articulate how we as individuals can live more perfect lives. Precisely because individuals may disagree over the inherent worthiness of certain ways of living over others, such beliefs are not in principle shareable by all.

One criticism of liberal neutrality, worth noting, is that such a principle may seem self-defeating. That is, the idea that the state ought to remain neutral among competing moral values in justifying laws and policies is itself a moral value. So how can liberal neutrality ever be truly impartial?\footnote{\textit{See}, e.g., Galston, George, supra note 19. For other criticisms of liberal neutrality see supra note 19.} One way to mitigate and maybe even avoid this objection is to realize that anti-perfectionism does not require that the state be neutral to all moral values in justifying laws and policies. Rather, it requires that the state only be neutral to conceptions of the good. This means that the state may not deem a particular way of life, worthwhile or valuable \textit{for its own sake}. Liberal neutrality may base laws and policies on the idea that a particular way of life has benefits for others. For instance, passing a law that prohibits assault on the idea that doing so benefits others does not violate anti-perfectionism. Liberal neutrality only rules out those laws and polices based on the idea that a particular orthodoxy is inherently good. So a law that prohibits a kind of consensual sexual activity on the idea that doing so has intrinsic benefits violates anti-perfectionism.

Even highlighting this feature of neutrality may not satisfy its critics.\footnote{\textit{See} Sher, supra note 19; \textit{but see} Quong 2011, supra note 19, at 12-13.} This Article does not seek to defend the soundness of liberal neutrality as a philosophical matter. As Andrew Koppelman thoughtfully suggests:

Neutrality is unsustainable when it is formulated this abstractly, but it is...
Disestablishment of Marriage

nonetheless a valuable political ideal. One of the many ways that government can go wrong is to take a position on some question that it would, all things considered, be better for it to abstain from deciding.22

Koppelman may be correct that attempting to articulate liberal neutrality at a very abstract level is self-defeating and so this Article does not attempt to do so. Rather, this Article points out that this principle of neutrality is at the very least an important political ideal in liberal political theory. And, as this Article argues below, constitutional law already operates, in certain ways, within a commitment to liberal neutrality.23

ii. Justificatory Constraint

This does not mean that the state should be “neutral regarding its effect on various conceptions the good.”24 Laws and policies may very well adversely affect a particular conception of the good. For instance, a law that prohibited assault would no doubt affect someone who believes that assaulting others is a worthwhile element of life. Liberal neutrality is about the justification of laws and policies.25 As Jonathan Quong puts it:


23 Michael Perry recognizes the difference between the following two questions: “is religion a morally legitimate basis of law-making in a liberal democracy? “ and “is religion a constitutionally legitimate basis of law-making in the United States?” Michael Perry, “Religion as a basis of law-making? Herein of the non-establishment of religion,” PHILOSOPHY SOCIAL CRITICISM, 35 (1-2): 105, 105 (2009). So even if one disagrees with the principle of liberal neutrality as a matter of political theory, Parts III and IV show that certain features of constitutional law already affirm it.


25 Similarly, constitutional law does not generally looks at the effects of a law in determining whether there is an equal protection violation. Washington v. Davis, 426 U.S. 229 (1976) (upholding a police officer test on equal protection grounds even though a disproportionate number of black individuals failed the test). The Court has “not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.” Id. at 239. Rather, the standard for imposing strict scrutiny requires that “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely ‘in spite of’, its adverse effects upon an identifiable group.” Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (upholding a Massachusetts law that automatically preferred veterans over
So long as the *reasons* underlying the central principles of the state are acceptable to all reasonable citizens, then the liberal principle of legitimacy is realized. Again, because reasonable people disagree about the good life, the state will have to eschew any appeals to conceptions of the good in justifying its core principles. Put another way, only *public reasons* – reasons that are acceptable to all reasonable citizens – can legitimize the coercive use of state power over its citizens.26

So a law that prohibits assault would be legitimate as long as it was based on reasons that could genuinely be shared by all such as preventing harm to others.27 The crucial point is that a law banning assault does not rest on the belief about the inherent goodness of a particular way of life. Rather, it rests on the idea that not assaulting others has extrinsic or public benefits, benefits that accrue to others. The state violates anti-perfectionism when it passes legislation on the idea that certain ways of life are good “for their own sake.” And such laws are often based on particular moral or religious precepts.

iii. Requirement of Good Faith

Anti-perfectionism contends that laws and policies may not be based on a particular conception of the good, on the idea that a particular way of live is intrinsically better than another. In applying this justificatory constraint, the state must proffer its reasons in good faith. Though this constitutes an important even obvious part of the requirement of liberal public reason, it is often under theorized by political theorists. If a reason is on its face proper but put forth disingenuously this cannot accord with public reason. Deploying such reasons willy-nilly would undo the justificatory constraint. Micah Schwartzman makes a robust defense of, as he calls it, a requirement of “public sincerity”:

Citizens and public officials cannot know whether their reasons are shared or otherwise sufficient to support their views unless they subject those reasons to public scrutiny. But if everyone expects others to act

26 Quong, supra note 24, at 233; see also Larmore, supra note 7, at 44.

27 See generally SONU BEDI, Rejecting Rights (Cambridge University Press) (2009). (arguing that properly understood Mill’s harm principle represents a justificatory constraint that accords with liberal neutrality and the Court’s jurisprudence in the areas of property, religion, and privacy).
**Disestablishment of Marriage**

strategically by offering insincere reasons, then the epistemic value of deliberation is diminished, if not altogether extinguished. To preserve the significance of deliberation, then, citizens ought to conform with a principle of public sincerity.\(^{28}\)

This means that a state cannot proffer an otherwise legitimate rationale in bad faith. If it were able to do so, the justificatory constraint of liberal neutrality would be easily undone.

**B. Difference Between Marriage and Civil Union or Domestic Partnership**

Given this account of liberal neutrality or anti-perfectionism, the state ought to disestablish marriage. Essential to this argument is the distinction between marriage and civil unions or domestic partnerships. Drawing on this distinction, this Article suggests that marriage is a based on one of two features, a morally special status or a religious underpinning. Both are inconsistent with the tenets of liberal neutrality. This Article situates this argument within the context of the constitutional debate over same-sex marriage.

**i. Marriage as Status: The Debate over Same-Sex Marriage**

Currently, nine states and the District of Columbia recognize same-sex marriage.\(^{29}\) Four states do not permit such marriages but allow same-sex couples to enter civil unions or domestic partnerships.\(^{30}\) Civil union or domestic partnership laws provide gay couples all the legal benefits, burdens, and responsibilities that come with marriage withholding its all-important label.

This distinction between marriage and civil union became central to the

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\(^{30}\) Delaware, Hawaii, New Jersey and Illinois
debate over same-sex marriage as a result of Baker v. State (Vt. 1999), a Vermont Supreme Court decision that struck down prohibitions on same-sex marriage under the Vermont constitution. The court held that by refusing to provide legal recognition to same-sex couples, the state of Vermont violated the equal benefits clause of the Vermont Constitution, that constitution's equal protection analog to the equal protection clause of the Fourteenth Amendment. Finding a constitutional violation, the court gave the legislature two options to remedy it: either permit same sex couples to marry or provide them civil unions or domestic partnerships:

We hold only that plaintiffs are entitled under [the Vermont Constitution] to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as “domestic partnership” or “registered partnership” acts, which generally establish an alternative legal status to marriage from same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by law to married partners.  

The legislature opted for civil unions or domestic partnerships. This was seen as a less controversial move, precisely because it withheld the all-important status of marriage. In explaining its decision to pass the Vermont Civil Union Statute of 2000, the legislature acknowledged that “while a system of civil unions does not bestow the status of civil marriage, it does satisfy the requirements of the Common Benefits Clause.” One journalist covering the Vermont decision summed up the reaction of an unnamed minister as follows: “I don't care what people do,”
Disestablishment of Marriage

[the minister] insisted. "Just don't call it marriage. It can't be marriage." Even though gay couples would receive all the same benefits, burdens, and responsibilities that come with marriage, they would not receive the label of “marriage.” Vermont granted all couples the status of marriage in 2009. The label of “marriage” is important, because it adds something to the relevant union, something that goes above and beyond the tangible benefits and burdens that accompany civil unions. In Goodridge v. Dep't of Public Health (Mass. 2003), the Massachusetts Supreme Judicial Court invalidated Massachusetts’ prohibition on same-sex marriage, making clear that “[t]angible as well as intangible benefits flow from marriage.”

In Maynard v. Hill (1888), the Court held that a state legislature may dissolve the bonds of marriage. Justice Stephen Field, writing for the Court, famously reasoned that marriage is a kind of status. Marriage is:

declared a civil contract for certain purposes, but it is not thereby made synonymous with the word “contract” employed in the common law or statutes. . . .The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.

This distinction between status and contract has been crucial in the debate over same-sex marriage. As Janet Halley points out, “advocates and opponents [of same-sex marriage have] converge[d] on an image of marriage as status.” On one hand, gays and lesbians seek that status to affirm their


37 Goodridge at 322.

38 125 U.S. 190 (1888).

39 Maynard at 212-213. Alongside this view of marriage as a status is a conflicting one that considers it like any other contract, a view that was also present in the 19th century, see generally MICHAEL GROSSBERG, Governing the Hearth: Law and the Family in Nineteenth-Century America (University of North Carolina Press) (1988).

Disestablishment of Marriage

relationships. On the other hand, detractors seek to protect it from alteration. Joseph Singer, writing positively in light of the decision in Goodridge, makes clear that:

After all, marriage is not just an ordinary contract; it is a status conferred by state officials who issue a license and conduct a ceremony in which they state: “By the authority invested in me by the Commonwealth of Massachusetts, I hereby declare you to be married.”

More recently, the California Supreme Court struck down that state’s prohibition on same-sex marriage even though California had afforded same sex couples the legal option of civil union or domestic partnership. The Court held that refusing to grant same sex couples the status of marriage was unconstitutional under the California Constitution. In doing so it suggested that the label of marriage is special. “[B]y reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership,” the state of California denies “same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.” There is something that comes with the label of marriage, something special that civil unions do not provide.

ii. Intangible Benefits of Marriage

Both sides in the same-sex marriage debate view marriage as importantly different from civil unions or domestic partnerships. Civil unions may provide all the legal benefits, burdens, and responsibilities as marriage, but they do not provide the “intangible good” that comes with marriage. What is this intangible good? This Article outlines two possibilities: a morally special status or a religious underpinning.

1. Morally Special Status

According to Tamara Metz, marriage “functions as a special symbolic resource that individuals can use to say something about who they are to

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42 In re Marriages, 43 Cal. 4th 757 (Cal. 2008).

43 Ibid at 830-831.
Disestablishment of Marriage

themselves, their partners, and their communities.” It functions as an affirmation of the moral worthiness of this kind of union. This is why gays and lesbians do not merely seek to be civilly unionized. They seek the morally special status that comes with saying that they are married.

The perspective of recent natural law theory is instructive in elucidating this special status. Robert George, one of key figures in this tradition, argues that marriage is “especially in its sexual dimension,” “an intrinsic, rather than merely instrumental, human good.” It is the “one flesh union” that arises from procreative sex within marriage that constitutes this good:

The central and justifying point of sex is not pleasure (or even the sharing of pleasure) per se, however much sexual pleasure is sought-rightly sought-as an aspect of the perfection of marital union; the point of sex, rather, is marriage itself, considered as an essentially and irreducibly (though not merely) bodily union of persons-a union effectuated and renewed by acts of sexual congress--conjugal acts.

Under this view, the sex act within marriage is morally superior to sex acts that occur outside of it. George explicitly privileges this conception of the good, this way of living. He does not argue that this way of life is superior, because it provides benefits to others. Marriage is an intrinsic good. It is worthwhile for its own sake, providing a kind of good that other ways of living including being unmarried, setting up a civil union, having “flings” or multiple partners or being with platonic friends cannot. This is the morally special status of marriage.

Now George’s argument for marriage explicitly excludes same-sex couples. He would not doubt withhold the state’s conferral of marriage to gays and lesbians. Gays and lesbians do not fulfill the procreative part of his definition of marriage. But leaving the issue of procreation to one side, this Article discusses its constitutional relevance below, George’s logic informs the idea that marriage provides the individuals that undertake it a kind of moral status that civil unions do not.

2. Religious Underpinning

44 TAMARA METZ, Untying the Knot: Marriage, the State, and the Case for Their Divorce. Princeton Press (2010) 89.


46 George, supra note 45, at 73
This “intangible” quality of marriage may very well also be religious in nature. One scholar of marriage law even characterizes the Vermont’s Civil Union Statute of 2000 as a “secular alternative to marriage for same-sex couples.” This implies that unlike a civil union, marriage is based on something besides a secular purpose. In fact, Perry Dane argues that the “‘secular’ and ‘religious’ meanings . . . of marriage are so intermeshed in our history, legal and religious imagination” that we cannot “wall off” civil marriage from its “religious considerations.” Civil unions, then, do not capture the possible religious underpinning that comes with the label of marriage, an underpinning that has historical and current roots in religion. Dane goes on to point out that even a “casual observer would, of course, notice that the laws of all the states recognize religious clergy or religious communities, in addition to various civil officials, as officiants in civil marriages. No other civil institution is structured quite this way.” In a 2003 poll, conducted after Goodridge, 53 percent of respondents viewed marriage as principally a religious matter, while 33 percent viewed it principally as a legal matter. And it is precisely the religious character of marriage that often generates intense opposition to same-sex marriage. That is, even though the constitutional debate is just on civil marriage, the institution’s religious underpinning is difficult to deny given the fact that individuals object to same-

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50 Dane, supra note 48, at 1137.

Disestablishment of Marriage

sex marriage on precisely religious grounds.52

Ultimately, marriage is more than just its attendant secular contractual parts. Because marriage and civil unions are different, as the same-sex marriage debate makes clear, marriage must be a kind of special status providing a good that civil unions do not.

C. Label of Marriage Violates Liberal Neutrality

Anti-perfectionism contends that laws and policies may not be based on conceptions of the good, on what counts as an intrinsically worthwhile life. Taking this commitment seriously, then, as recent scholarly work argues, leads to the disestablishment of marriage.53 A putative liberal state must disestablish

52 According to the Pew Forum on Religion and Public Life, many religious groups object to same-sex marriage for religious reasons. Pew Forum on Religion and Public Life. http://pewforum.org/docs/?DocID=291. For instance, the U.S. Conference of Catholic Bishops justifies their position on grounds that “marriage is a faithful, exclusive and lifelong union between one man and one woman . . . Moreover, we believe the natural institution of marriage has been blessed and elevated by Christ Jesus to the dignity of a sacrament. United States Conference of Catholic Bishops. September 10, 2003 http://www.usccb.org/comm/archives/2003/03-179.shtml


Recent liberal theory also questions limitations on plural marriage or consanguinity, see, e.g., Andrew March. "Is There a Right to Polygamy? Marriage, Equality, and Subsidizing Families in Liberal Public Justification," Journal of Moral Philosophy, 8: 246, 246 (2011). March describes his argument as “[t]he Slippery Slope and the Slide from Same-Sex Marriage to Polygamy.” Ronald C. Den Otter, Is There Really any Good Argument Against Plural Marriage? ExpressO: http://works.bepress.com/ronald_den_otter/1 (2009) 4 (“I shall argue that no one yet has formulated an argument that successfully establishes that civil marriage ought to have a numerical limitation and that the burden is on the state to demonstrate that the failure to recognize plural marriage is consistent with the principles of freedom and equality that underlie fundamental rights and equal protection jurisprudence.”)

Consider also Hadley Arkes testimony before the subcommittee considering the
Disestablishment of Marriage

marriage, must not deploy the label of marriage precisely because it is based on either a morally special status or a religious underpinning.

A civil union may simply provide instrumental benefits to those who undertake it. The status of “being married,” as George makes clear, does something more. It provides an intrinsic good, expressing the belief that these kinds of relationships are morally special or even religiously significant. Marriage, as Metz says, is “a unique kind of expressive good, the value of which exceeds the sum of the delineable benefits and burdens that attach to it.”

Metz adopts liberal neutrality characterizing the putative liberal state in the following way:

Traditionally, liberals have treated the commands of the state as limiting action (not belief) for the narrow purpose of ensuring social order, protecting citizens from harm, and guaranteeing political fairness. Generally, the state confers legal status for instrumental convenience, not to alter self-understanding in any deep and enduring way. The familiar idea behind the limited state is that freedom consists, in large part, in individuals being free from interference to live according to their own design.

Given this view of the liberal state, conferring the status of marriage seems to confound it. In declaring individuals married the state alters “self-understanding.” Metz calls this the “expressive” or “constitutive” part of marriage.

What do marriage laws express in so marrying individuals? Richard Posner defines this kind of expressive act as one that affirms a “companionate” model of marriage as:

Defense of Marriage Act:

[I]f marriage . . . could mean just anything the positive law proclaimed it to mean, then the positive law could define just about anything as marriage. . . . Why shouldn’t it be possible to permit a mature woman, past child bearing, to marry her grown son? In fact, why would it not be possible to permit a man, much taken with himself, to marry himself?. . . What is being posed here is a question of principle: what is the ground on which the law would turn back these challenges? Defense of Marriage Act: Hearings on H.R. 3396, 104th Cong. 97-102 (1996)

54 Metz, supra note 44, at 36.

55 Metz, supra note 44, at 115.

56 Metz, supra note 44, at 93.

57 Metz, supra note 44, at 89-94.
between at least approximate equals, based on mutual respect and affection, and involving close and continuous association in child rearing, household management, and other activities, rather than merely the occasional copulation [of the procreative model].”

Goodridge also adopts the companionate model of marriage:

While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”

Or as Evan Wolfson puts it :"marriage is first and foremost about a loving union between two people who enter into a relationship of emotional and financial commitment and interdependence." Marriage expresses their commitment to this kind of union. Marriage is about enjoying one’s life with another. This model of marriage is, as William Eskridge suggests, “most similar to those that are typically valorized by most modern Western perspectives.”

By valorizing this kind of companionship, marriage confers a morally special status. By conferring it, the state takes sides in what ought to be each individual’s personal decision about how to live. This is why Metz concludes that the state goes beyond its “limited” role of providing mere instrumental benefits in marrying individuals. In doing so, as she goes on to say, the state “assumes [through marriage laws] the role of ethical authority. . . violating the type of neutrality necessary for the state to secure liberty and equality in a diverse polity such as ours.” After all, individuals may very well disagree


59 Goodridge at 332


62 Metz, supra note 44, at 115
about the inherent worthiness of this kind of companionate model of marriage, one that sanctifies the special nature of such a union. Individuals certainly disagree over the relevance and importance of religion in their lives. So if the intangible quality of marriage is its religious underpinning, a putative liberal state may not deploy it.

Elizabeth Brake, in line with Metz, argues that marriage laws are ultimately based on the “belief that marriage and companionate romantic love have special value.” It consists:

in the assumption that a central, exclusive, amorous relationship is normal for humans, in that it is a universally shared goal, and that such a relationship is normative, in that it should be aimed at in preference of other relationship types. The assumption that valuable relationships must be marital or amorous devalues friendships and other caring relationships, as recent manifestos by urban tribalists, quirkyaloners, polyamorists, and asexuals have insisted.

This kind of belief about the morally special status of marriage fails liberal neutrality. In fact, David Estlund also argues that a "more neutral, more liberal, liberalism" must reject marriage laws.

Now perhaps this conclusion is too quick. Stephen Macedo thoughtfully suggests that marriage promotes “public welfare.” For instance, “[m]arried men (much evidence suggests) live longer, have lower rates of homicide, suicide, accidents, and mental illness than unmarried ones.” But even if we assume the accuracy of the public welfare claim and this itself may be a controversial empirical assumption, it hardly proves that the state should stay

63 Brake, supra note 53, at 88
64 Brake, supra note 53, 88-89
68 For an argument that unmarried individuals live happy and healthy lives, see BELLA DEPAULO, Singled Out: How Singles are Stereotyped, Stigmatized, and Ignored, and
Disestablishment of Marriage

in the marriage business. This is for three reasons. First, the state could accomplish such public welfare goals by simply making available a civil union status to everyone. For instance, if the purpose were to facilitate economic stability facilitating issues such as inheritance or child support, civil unions would be sufficient to accomplish it. Why deploy the label of “marriage”? It is not at all clear that downgrading marriage in this way would undermine any such benefits, assuming such benefits exist.

Second, it is entirely possible—even likely—that the reason why unmarried individuals may have higher rates of mental illness, suicide and the like is because their way of living is not privileged by the state. The state stigmatizes unmarried individuals by conferring the status of marriage only to those who choose this as a their conception of the good. Marriage may even rest on animus against unmarried individuals, pointing out that they have failed to live up to certain perfectionist norms. By valuing one way of living, the state marks another as socially undesirable. This, in turn, makes it more likely that those who undertake the “socially undesirable” option will suffer more than those who do not. This is a kind of self-fulfilling prophecy.

Similarly, it seems equally likely that fifty years ago, gays and lesbians had higher rates of suicide and mental distress than their straight counterparts (and this is probably true even today). Gays were (and of course still are) forced to hide their sexuality. But we would reject the conclusion that “being straight” somehow promotes the “public welfare” even if it is true that gays are individually worse off in society. The conclusion to draw from these facts is not that heterosexuality is the answer but that the state ought to stop privileging that kind of lifestyle. And in the same way, it ought to stop conferring the morally special status of marriage. Doing so stands to stigmatize those who are not married just as the myriad of laws and policies that banned gay sex and privilege heterosexual ity stigmatize individuals for being gay.

Third, if the label of marriage has a religious underpinning, this ought to automatically rule it out as civil institution. Metz considers the case of baptism or a bar mitzvah. These ceremonies may very well have important benefits for those who undertake them. Suggesting that we permit the state to establish or confer such practices (imagine a state sanctioned “coming of age” ceremony) would violate liberal neutrality. Again, this is because such a ceremony represents a deep, moral and personal decision, and one that is often central to an individual’s conception of the good life.

Consider that recent work suggests that religious individuals are less likely than their non-religious counterparts to abuse drugs and alcohol, to be


69 Metz, supra note 44, at 114-115
stressed, and to suffer from low self-esteem.  

 Even if this may be evidence that individuals ought to consider becoming religious, it would be illegitimate for the state to establish a religion or act on such religious premises. Because religion like marriage is such a personal decision, so central to a conception of the good life, the state ought remain neutral towards it in line with the principle of anti-perfectionism.

What makes marriage different from civil unions explains why it violates a commitment to liberal neutrality or anti-perfectionism. Any attempt to avoid this conclusion by recasting marriage as mere civil union only reinforces it. It is precisely because marriage is seen as a morally special status, even one that has religious significant, that generates intense opposition to same-sex marriage. Civil unions avoid the moral and even religious baggage that comes with the label of marriage. But this baggage illuminates why a putative liberal state must get out of the marriage business.

So if we disestablish marriage in line with liberal neutrality, what (if anything) do we put in its place? We could downgrade marriage to a civil union status for everyone, avoiding the morally special status or religious underpinning that comes with the label of “marriage.” This would accomplish any secular goals of inheritance or economic stability without imposing the special moral or religious status of marriage. Or we could leave individuals to enter into contracts for themselves just as individuals are able to do so for any other kind of service or arrangement. Or we could find another kind of state sanctioned union that does not violate liberal neutrality. For example, after making the case for disestablishing marriage, Metz seeks to put in its place what she calls an intimate care giving union. (ICGU).  

Her justification for this kind of union is to promote, protect, and regulate intimate care giving. It would be open to “sexually intimate unions” and “nonsexually intimate” ones. It would not necessarily invoke the morally special status that comes with the label of marriage. Someone who has no romantic partner could still form an ICGU with an elderly loved one whom they are caring for.

Ultimately, this Article leaves the question of what to replace marriage with to one side: whether it be civil unions for all, private contract, ICGUs or some other system. The purpose of this Article is to show that taking the commitment to liberal neutrality or anti-perfectionism leads to the disestablishment of marriage.

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71 Metz, supra note 44, see also Brake supra note 53

72 Metz, supra note 44, at 135
II. Why Prohibitions on Same-sex marriage are Unconstitutional

This Article situates liberal neutrality and its objection to marriage in the context of the constitutional debate over same-sex marriage. The Court summarily dismissed a Minnesota Supreme Court decision that upheld that state’s ban on same-sex marriage in Baker v. Nelson (1972). The Court simply said that such a ban did not raise any federal not to mention constitutional issues.73 Much has changed since 1972. Not only have state courts struck down prohibitions on same-sex marriage under their respective state constitutions but federal courts have also struck down such bans drawing on cases such as Romer v. Evans (1996) (invalidating an anti-gay state amendment)74 and Lawrence v. Texas (2003) (invalidating sodomy laws).75 And the Court has recently agreed to review two lower appellate decisions, one that struck down the Defense of Marriage Act (DOMA), a federal law that does not recognize valid same-sex marriages, and the other that struck down Proposition 8, the California state amendment that banned same-sex marriage.76 This Article draws from these cases and current constitutional doctrine to outline three constitutional approaches to invalidating prohibitions on same-sex marriage: a constitutional right to marry approach, an equal protection approach, and an establishment clause approach. This Article considers each in turn.

A. Constitutional Right to Marry Approach

The Court subjects laws and policies that violate a fundamental constitutional right to strict scrutiny.77 In Loving v. Virginia (1967) the Court invalidated anti-miscegenation laws holding that the “freedom to marry has

73 Baker at 810


75 539 U.S. 558 (2003)

76 See supra note 2.

77 See generally U.S. v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (“when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments” or when it discriminates against “discrete and insular minorities.”). For an argument that fundamental, non-enumerated rights are unnecessary in constitutional adjudication, see SONU BEDI, Rejecting Rights (Cambridge University Press) (2009).
long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” In these and other cases, the Court makes clear that there is a fundamental right to marry under the Constitution. Moreover, the Court has asserted on numerous occasions that marriage is "the most important relation in life," that it is "fundamental to the very existence and survival of the race."

As Vanessa A. Lavely makes clear the:

constitutional right to marry has been well established as a fundamental right for at least forty years... Although the Supreme Court could have based its opinion [in Loving] solely on the ground that the statutes constituted racial discrimination in violation of the Equal Protection Clause, it also held that the laws arbitrarily deprived the couple of a fundamental liberty protected by the right of privacy implicit in the Due Process Clause--the freedom to marry.

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78 Loving at 12

79 See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating sterilization order for an inmate) (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”) Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (invalidating a law banning the use of contraceptives among marriage couples) (“We deal with a right to privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”); Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (holding that state could not limit freedom to marry for failure to pay child support) (“Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that ‘critical examination’ of the state interests advanced in support of the classification is required.”), Turner v. Safley, 428 U.S. 78 (1987) (holding that prison inmates have a fundamental right to marry).

80 Maynard at 205

81 Skinner v. Oklahoma, 316 U.S. 535, 541(1942)

82 Vanessa A. Lavely, The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistences Between Marriage and Adoption Cases, 55 UCLA L. REV. 247, 267. See also Erwin Chemerinsky, Constitutional Law: Principles and Policies 644 (1997) (recognizing Loving as the Court’s first articulation of “the right to marry as a fundamental right”); Alan C. Michaels, Constitutional Innocence, 112 HARV. L. REV. 828, 855-856 (arguing that the fundamental right to marry was established twenty years after Williams v. North Carolina, 317 U.S. 287 (1942) (failing to affirm the fundamental
Disestablishment of Marriage

Evan Gerstmann emphasizes this very approach, one that affirms the fact that there is a constitutional right to marry the “person one loves.” He recognizes that the issue here is not, as Mark Strasser suggests, “whether the right to marry is fundamental—it clearly is—but whether the fundamental right to marry includes the right to marry one’s same-sex partner.” If, as Gerstmann suggests, “the right to marry is constitutionally protected for convicted criminals and parents who fail to make court-ordered child support payments, the right to marry must mean, at a minimum, that the state bears the burden of explaining why gays and lesbians cannot exercise this right,” Gerstmann argues that the state cannot meet this burden, because any argument suggesting that the right to same-sex marriage is not part of this right fails. And if bans on same-sex marriage do violate such a right, under the fundamental right approach, they receive strict scrutiny where such bans will most certainly be struck down.

B. Equal Protection Approach

The equal protection clause says that “no state shall deny to any person within its jurisdiction the equal protection of the laws.” Under the Court’s current interpretation of it, laws and policies that discriminate against certain groups or classes receive a form of heightened scrutiny. Laws discriminating

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84 MARK STRASSER, Legally Wed: Same-Sex Marriage and the Constitution (Cornell Press) (1997) 51. GERSTMANN, supra note 83, at 91. See also Justice Antonin Scalia’s practice of evaluating the constitutional status of an activity by focusing on its most specific level of characterization, Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that there is no constitutional due process right of a biological father to “a child adulterously conceived”).

85 GERSTMANN, supra note 83, at 91. See also supra note 82.

86 GERSTMANN, supra note 83, at 91-118.

87 See generally Carolene Products, supra note 77.

88 Amendment XIV. Sec. 1. U.S. Constitution

89 This Article uses “heightened scrutiny” or “higher scrutiny” to mean any kind of scrutiny greater than rational review. The cases this Article considers are those arising
Disestablishment of Marriage

on the basis race,\textsuperscript{90} alienage,\textsuperscript{91} and national origin\textsuperscript{92} get strict scrutiny: where the Court asks whether the law is narrowly tailored to serve a compelling state purpose. Laws discriminating against sex get intermediate scrutiny: where the Court asks whether the law is substantially related to serving an important governmental purpose. Those laws that do not invoke a suspect classification merely receive rational review, the most deferential standard of review. Under rational review, the legislation must only have a legitimate purpose and the means must be rationally related to that purpose. This Article treats the heightened scrutiny and rational review analyses separately in considering the constitutionality of prohibitions on same-sex marriage. It thereby divides equal protection doctrine into two distinct approaches: one, the suspect class and heightened scrutiny approach and two, the rational review approach.

\textbf{i. Suspect Class/Classification and Heightened Scrutiny}

There are many groups in society: racial groups, the local Parent Teacher Association, gays and lesbians, women, a simple book club, blonds, or those with a particular eye color. Most are not suspect classes. Cass Sunstein argues that the core purpose of the equal protection clause is “an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding.”\textsuperscript{94} The Court’s jurisprudence points to the following criteria under the equal protection clause of the Fourteenth Amendment. While the distinction between federal and state power is constitutionally important, it is generally irrelevant to the argument presented here. This Article’s conclusion would apply to federal legislation concerning marriage as well state legislation. After all, the Court applies the same tiers-of-scrutiny analysis to Congressional laws. See, e.g., \textit{Bolling v. Sharpe}, 347 U.S. 497, 500 (1954) (“it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government” than on state governments in enforcing equality); \textit{Adarand Constructors, Inc. v. Pena} 515 U.S. 200 (1995) (holding that a federal policy benefiting racial minorities in federal contracts must receive strict scrutiny).


\textsuperscript{91} See \textit{Graham v. Richardson}, 403 U.S. 365 (1971)

\textsuperscript{92} See, e.g., \textit{Oyama v. California}, 332 U.S. 633 (1948); \textit{Korematsu v. United States}, 323 U.S. 214 (1944)

\textsuperscript{93} See, e.g., \textit{Craig v. Boren}, 429 U.S. 190 (1976)

to determine if the trait or class at issue is suspect: immutability, irrelevance, a history of discrimination, and political powerlessness. Again, under current constitutional doctrine, racial minorities and women are “in”—they count as protected disadvantaged groups, thereby making race and sex suspect classifications. Laws that discriminate on the basis of race or sex receive a heightened form of scrutiny. The more the Court strictly scrutinizes a law, the more likely it will be struck down. For instance, according to Adam Winkler, between 1990 and 2003, 73% of all race-conscious laws subjected to strict scrutiny in federal courts were struck down.

Under this approach it makes all the constitutional difference whether the law or policy disadvantages a suspect class.

There are two ways this approach can invalidate prohibitions on same-sex marriage. First, if such prohibitions discriminate on the basis of sex or gender, they ought to receive intermediate scrutiny. Receiving such scrutiny means that a court will likely strike down such prohibitions. Though the decision was effectively undone by a state constitutional amendment, in Baehr v. Lewin (Hawaii 1993) the Hawaii Supreme Court, the first American court to do so, held that a ban on same-sex marriage triggers heightened scrutiny under a state’s equal protection clause. The court reasoned that such

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95 See, e.g., City of Cleburne v. Cleburne, 473 U.S. 432, 440-444; Frontiero v. Richardson, 411 U.S. 677, 685-687 (1973). Weber v. Aetna, U.S. 164, 175 (1972) (invalidating compensation scheme that treated excluded illegitimate children but not legitimate children)(“Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent.”)

96 See, e.g., Frontiero at 686 ("sex characteristic frequently bears no relation to ability to perform or contribute to society.").

97 See, e.g., City of Cleburne v. Cleburne, 473 U.S. 432, 441 (1985); San Antonio v. Rodriguez, 411 U.S. 1, 28 (1973) (the “class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian process”); Frontiero v. Richardson, 411 U.S. 677, 684-685 (1973).

98 Id. See also Graham v. Richardson 403 U.S. 365, 372 (1971) (“Aliens as a class are a prime example of a "discrete and insular" minority [citing Carolene Products] for whom such heightened judicial solicitude is appropriate.”)


100 74 Haw. 530 (Hawaii 1993)
a ban is a kind of sex discrimination invoking a suspect classification. It recognized the fact that “[p]arties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.” That is, a gay man marry a lesbian or vice versa. A ban on same-sex marriage thereby discriminates on the basis of sex. Two men may not marry. But change the sex or gender of one the parties, and the marriage is permissible. In fact, scholarly work argues that discrimination against gays and lesbians is nothing other than sex discrimination.

Second, such prohibitions discriminate against gays and lesbians, treating individuals differently on the basis of sexual orientation. Currently gays and lesbians do not count as a suspect class under the equal protection clause of the Fourteenth Amendment. Scholarly work has argued that they ought to

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101 Baehr at 544


But see Edward Stein, Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights, 49 UCLA L. REV. 471, 500 (2000) (“[The argument from sexism] mischaracterizes the nature of laws that discriminate against lesbians and gay men to see them as primarily harming women (or even as harming women as much as they harm gay men, lesbians, and bisexuals).” See also Cass Sunstein, Homosexuality and the Constitution, 70 IND. L.J. 1, 19 (1994) (arguing that there is no instance of discrimination on the basis of sex where a law is symmetric, treating men and women are exactly the same); Baehr v. Lewin, 852 P. 2d 44, 71 (Haw. 1993) (Heen, dissenting) (rejecting the sex discriminatory claim because ban on same-sex marriage treats men and women equally).

103 Watkins v. U.S. Army 837 F.2d 1428 (9th Cir. 1988) (concluding that gays constitute a suspect class invalidating the military’s explicit ban on homosexuals—this was before the military’s current Don’t Ask Don’t Tell policy). The case was overturned en banc by the full Ninth Circuit. Watkins v. U.S. Army 875 F.2d. 699 (9th Cir. 1989)
Disestablishment of Marriage

count as one, thereby rendering sexual orientation a suspect classification under the equal protection clause.\textsuperscript{104} And state supreme courts have invalidated prohibitions on same-sex marriage on grounds that gays do count as a protected group under their respective state constitutions.\textsuperscript{105} More recently, the Second Circuit Court of Appeals invalidated the Defense of Marriage Act (DOMA) by deeming sexual orientation a suspect classification.\textsuperscript{106} The appeals court concludes that gays and lesbians meet the four factors that inform suspectness: immutability, irrelevance, a history of discrimination, and political powerlessness.\textsuperscript{107} The court reasons that:

In this case, all four factors justify heightened scrutiny: A)


Even the executive branch under President Obama has weighed in on this debate in his refusal to defend the Defense of Marriage Act in federal court. (“scientific consensus accepts that sexual orientation is a characteristic that is immutable. . . most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today”). Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, 2/23/2011. \url{http://www.justice.gov/opa/pr/2011/February/11-ag-223.html}

\textsuperscript{105} See, e.g., Kerrigan v. Commission of Public Health, 289 Conn. 135 (Ct. 2008); Lewis v. Harris, 188 N.J. 415 (NJ 2006); In re Marriages, 43 Cal. 4th 757 (Cal. 2008) (“Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (“gay and lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation.”) (“so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change [it].”).

\textsuperscript{106} Windsor v. United States, 699 F.3d 169 (2nd Cir. 2012). The decision in part looks to federalism concerns in invalidating DOMA. While this kind of federal law raises such constitutional issues, this Article leaves such concerns to one side in elucidating the suspect class approach, see supra note 89.

\textsuperscript{107} Windsor at 181-185.
Disestablishment of Marriage

homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.\textsuperscript{108}

The court thereby subjects the Defense of Marriage Act to heightened scrutiny, in this case intermediate scrutiny, noting that when \textit{Baker} was decided in 1971, “‘intermediate scrutiny’ was not yet in the Court’s vernacular.”\textsuperscript{109} In subjecting the federal law to intermediate scrutiny, the court concludes that it is unconstitutional under the equal protection clause. Again, the Court has agreed to review the Second Circuit Case in its 2013 term.\textsuperscript{110}

ii. Rational Review

The second prong of the equal protection approach is a rational review analysis. This review applies to all laws and policies not simply those that discriminate against suspect classes or classifications. As one scholar suggests, heightened scrutiny is strict “in theory and fatal in fact” while rational review is “minimal scrutiny in theory and virtually none in fact.”\textsuperscript{111} But rational review has been sufficient to invalidate prohibitions on same-sex marriage. The Massachusetts Supreme Judicial Court invalidated its ban on same-sex marriage in \textit{Goodridge} under the Massachusetts Constitution without invoking the suspect class or classification analysis. It did so under rational review arguing that there was no legitimate purpose for a ban on same-sex marriage.\textsuperscript{112}

\textsuperscript{108} \textit{Windsor} at 181-182.

\textsuperscript{109} \textit{Windsor} at 179. The court did not impose strict scrutiny reasoning that:

Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect. While homosexuals have been the target of significant and long-standing discrimination in public and private spheres, this mistreatment “is not sufficient to require ‘our most exacting scrutiny.’” \textit{Windsor} at 185.

\textsuperscript{110} See supra note 2.

Disestablishment of Marriage

Richard Farrell argues that the Court’s jurisprudence on rational review is itself often contradictory. For Farrell, this contradiction arises because the Court will sometimes require that there be no possible or conceivable legitimate purpose for the law (an interpretation of rational review that is easy to meet) and other times require that the actual purpose of the law be legitimate (an interpretation of rational review that is harder to meet). The latter interpretation points to what is often called rational review “with bite.”

This section draws heavily from Perry v. Schwarzenegger (N.D. Cal. 2010), the first federal court to strike down prohibitions on same-sex marriage, in outlining the rational review approach. Writing the district court opinion, Chief Judge Vaughn Walker struck it down under the equal protection clause holding that a state may not limit marriage just to opposite sex couples. The “court need not address the question whether laws classifying on the basis of


115 While the Ninth Circuit Court of Appeals upheld the decision—also under a rational review standard—it deployed a narrower argument that the district court, one that was that peculiar to the Proposition 8, the state amendment that took away the right to same-sex marriage. “Whether under the Constitution same-sex couples may ever be denied the right to marry. . . is an important and highly controversial question. . . We need not and do not answer the broader question in this case, however, because California had already extended to committed same-sex couples both the incidents of marriage and the official designation of ‘marriage,’ and Proposition 8’s only effect was to take away that important and legally significant designation, while leaving in place all of its incidents. This unique and strictly limited effect of Proposition 8 allows us to address the amendment’s constitutionality on narrow grounds.” Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir. 2012).
sexual orientation should be subject to a heightened standard of review.”

The court concludes that Proposition 8 “cannot withstand rational basis review.” Schwarzenegger does not invoke the suspect class inquiry and the heightened scrutiny that accompanies it.

In drawing from Schwarzenegger, this Article suggests that even a permissive interpretation of rational review constitutionally dooms prohibitions on same-sex marriage. It reveals that any possible legitimate reasons cannot be the basis for bans on same-sex marriage. The only possible reasons for such bans are reasons that the Court already deems constitutionally inadmissible. The Court itself never makes clear what counts as a legitimate rationale. It’s hard to decipher what the constitutional definition of “legitimate” means. If anything, as one scholar rightly remarks, the “guidance the Court has provided has more often focused on what is illegitimate[.]” and this Article does so as well.

1. Reasons that are Circular or Proffered in Bad Faith

Those that seek to justify bans on same-sex marriage often invoke the need to maintain opposite sex marriage and child rearing/responsible procreation as doing the constitutional justificatory work. But these rationales cannot constitute possible reasons for banning same-sex marriage.

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116 Schwarzenegger at 997

117 Schwarzenegger at 997


119 See, e.g., Schwarzenegger at 998 (“Proponents first argue that Proposition 8 is rational because it preserves: (1) ‘the traditional institution of marriage as the union of a man and a woman’, (2) ‘the traditional social and legal purposes, functions, and structure of marriage’, and (3) ‘the traditional meaning of marriage as it has always been defined in the English language.’”); Massachusetts v. U.S. Dept of Health and Human Services at 14 (“defending and nurturing the institution of traditional, heterosexual marriage”); Windsor v. U.S. at 187 (“Congress undertook to justify DOMA as a measure for preserving traditional marriage as an institution.”);

120 See, e.g., Schwarzenegger at 999-1000 (Proponents of banning same-sex marriage argue that such bans promote “stability and responsibility in naturally procreative relationships”; Perry v. Brown at 1086 (“furthering California’s interest in childrearing and responsible procreation.”); Massachusetts v. U.S. Dept of Health and Human Services at 14 (“to support child-rearing in the context of stable marriage.”); Windsor v. U.S. at 187 (“DOMA advances the goals of ‘responsible childrearing.’”).
Disestablishment of Marriage

a. Maintain Marriage just for Opposite Sex Couples

This rationale is circular. It posits maintaining opposite-sex marriage as a reason for keeping bans on same-sex marriage in place. But this cannot be a legitimate reason for the law—or any law for that matter. This amounts to a claim that the law should not be changed or altered because doing so will alter or change the law. For instance, the official website for Proposition 8 says that: “The [California] Supreme Court’s decision to legalize same-sex marriage did not just overturn the will of California voters; it also redefined marriage for the rest of society. . . . This decision has far-reaching consequences.”121 In explaining what these “far-reaching consequences” actually are, the Proposition 8 supporters go on to say that by “saying that a marriage is between ‘any two persons’ rather than between a man and a woman, the Court decision has opened the door to any kind of ‘marriage.’ This undermines the value of marriage altogether at a time when we should be restoring marriage, not undermining it.”122 Thus, the alleged bad consequence of redefining marriage is that marriage will now be undermined because the definition will have changed. This is patently circular. Of course, changing the definition of civil marriage will undoubtedly undermine the traditional meaning of marriage. Schwarzenegger concludes that it is not enough to say that the state should maintain “the definition of marriage as the union of a man and a woman for its own sake.”123 This kind of argument would prevent a court from striking down any legislation under rational review.

b. Child Rearing/Responsible Procreation

Child rearing/responsible procreation cannot function as possible reasons for a ban on same-sex marriage. Leaving to one side the issue of whether children do better whether raised in same or opposite-sex couples, marriage laws do not seek to regulate the institution in light of child rearing or procreation. The California Supreme Court rejected this kind of justification, when it invalidated that state’s prohibition on same-sex marriage. The court concludes that:


123 Schwarzenegger at 998.
the right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children. Men and women who desire to raise children with a loved one in a recognized family but who are physically unable to conceive a child with their loved one never have been excluded from the right to marry.\footnote{In re Marriages at 825}

\ldots

A person who is physically incapable of bearing children still has the potential to become a parent and raise a child through adoption or through means of assisted reproduction, and the constitutional right to marry ensures the individual the opportunity to raise children in an officially recognized family with the person with whom the individual has chosen to share his or her life. Thus, although an important purpose underlying marriage may be to channel procreation into a stable family relationship, that purpose cannot be viewed as limiting the constitutional right to marry to couples who are capable of biologically producing a child together.\footnote{In re Marriages at 826}

The court also cites \textit{Turner v. Safley} (1987), a decision that specifically considers the relationship of procreation and marriage. \textit{Safley} points to the “bad faith” charge of the procreative objection to same-sex marriage. In \textit{Safley}, the state of Missouri Department of Corrections promulgated various penal regulations. One of these regulations prohibited inmates from marrying unless they first received approval from the superintendent, approval that should be given only “when there are compelling reasons to do so.”\footnote{Safley at 82} The Department of Corrections stated that “only a pregnancy or the birth of an illegitimate child would be considered a compelling reason.”\footnote{Safley at 96-97} Why does pregnancy or birth constitute a compelling reason but not love, commitment, or the wide variety of benefits attached to marriage? Marriage is primarily about procreation about the raising of children, or so the prison regulation here implies.

The Court invalidates this regulation concluding that “[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including the] expressions of emotional support and public commitment [that] are an important and significant aspect of the
Disestablishment of Marriage

marital relationship.”

This language is cited approvingly by the California Supreme Court to establish the point that procreation is not a requirement for marriage. In fact, Safley rehearses the legal benefits that arise from marriage including “the receipt of government benefits” such as Social Security and “property rights.” An inmate may very well seek to marry for these reasons, reasons that have nothing to do with procreation. Procreation is not necessary to avail oneself of the institution of marriage. And Evan Gerstmann rightly points out that these attributes of emotional support and public commitment "are as applicable to same-sex couples as to heterosexual couples." So as a constitutional matter concerns of procreation and hence the raising of children cannot underlie a prohibition on same-sex marriage just as they could not underlie limiting an inmate’s ability to marry. Those who make such an argument in the context of same-sex marriage do not do so in good faith. Something else must be going on.

128 Safley at 95-96
129 Safley at 96
131 Similarly, it will not suffice to argue that same-sex marriage will lead to more divorces among opposite sex couples. As William Eskridge notes, in European countries such as Denmark and Sweden where same-sex unions have been legally recognized in some fashion from 1989 there has been no adverse effect on the institution of marriage for heterosexuals. William N. Eskridge, Jr. Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition, 31 MCGEORGE L. REV. 641, 659-662 (2000).

If anything, the effect has been positive. Eskridge at 659-662. This trend is born out in recent numbers from the Division of Vital Statistics at the Centers for Disease Control. http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.htm Massachusetts began issuing same-sex marriage licenses in 2004. The divorce rate in 2007 for the state was 2.3 per 1000 people, which was less than the average rate for the rest of the country. In fact, all the states that permit same-sex marriage have a lower rate of divorce than the average of the others. http://www.divorce.com/blog/cdc-report-shows-massachusetts-has-lowest-divorce-rate.

Moreover, this kind of justification for a prohibition on same-sex marriage cannot be made in good faith. Those who support such a prohibition on these grounds do not seek to prevent divorce or even the number of times an individual may marry. It is revealing that those who place referenda such as Proposition 8 on the ballot do not seek to place restrictions on divorce. Nothing is more detrimental to the institution of marriage than the ability to obtain a divorce. James Q. Wilson suggests that the adoption by states of a regime of no fault divorce has undermined marriages. Wilson, JAMES. Q. WILSON, The Marriage Problem: How Our Culture Has Weakened Families.
Disestablishment of Marriage

_Schwarzenegger_ puts it even more starkly, reasoning that California’s ban on same-sex marriage “has nothing to do with children,” rather, it “simply prevents same-sex couples from marrying.”132 “Even if California had an interest in preferring opposite-sex parents to same-sex parents, [its ban on same-sex marriage] is not rationally related to that interest, because [such a ban] does not affect who can or should become a parent under California law.”133 After all, marriage laws are simply about marriage. That is, _Schwarzenegger_ concludes that procreation or child rearing cannot be a possible reason for banning same-sex marriage, because these rationales do not explain the law’s actual effect. In essence, this reasoning informs the requirement of public sincerity outlined above. It requires that the state not be able to proffer a reason for the law that has no rational connection to the actual law being challenged.

In _Cleburne v. Cleburne Living Center_ (1985), a case that arose under the equal protection clause, the Court invalidated a city ordinance that required a permit in order to establish a home for the mentally challenged. The city proffered various rationales for singling out a home for the mentally challenged. The city insisted that “several factors” explained the need for a license in this case but not in any other.134 The Court reasoned that these explanations were proffered in bad faith.135 For instance, the city argued that the license was necessary because the location of the anticipated home was in a flood area and because the “size of the home” and “the number of people” occupying it would be too large.136 But the Court held that these reasons could not be a possible justification for the law. This concern “with the possibility of a flood, however, can hardly be based on a distinction between the home [for the

(Harper Paperbacks) (2003). No fault divorce laws mean that a spouse can procure a divorce for any reason or no reason at all. All fifty states have incorporated some provision for no fault divorce. KARLA B. HACKSTAFF _Marriage in a Culture of Divorce_. Temple Press (1999) at 28.

So even states that prohibit same sex marriage permit no fault divorce. How can these states simultaneously proffer the protection of marriage as a justification for limiting marriage, if they do not limit the number of times an individual may marry or restrict their ability to procure a divorce? Ultimately, it means that reasons related to procreation, divorce or preserving opposite sex marriages are made in bad faith.

132 _Schwarzenegger_ at 1000.

133 _Schwarzenegger_ at 1000.

134 _Cleburne_ at 448

135 _Cleburne_ at 448-450

136 _Cleburne_ at 449
mentally challenged] and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the . . . site without obtaining a special use permit.”137 With regards to size and number of occupants, the Court makes clear that this concern did not apply to homes used for other purposes. Thus, the city “never justifies its apparent view that other people can live under such ‘crowded’ conditions when mentally retarded persons cannot.”138 Ultimately, the Court concludes that “requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”139 Cleburne enforces the requirement of public sincerity by ensuring that the state does not undermine the rational review standard by proffering a rationale in bad faith.140

137 Cleburne at 449
138 Cleburne at 450
139 Cleburne at 450
140 See also Justice Ruth Bader Ginsburg’s dissent in Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the partial birth abortion ban). Here the Court upheld a federal ban on a particular abortion procedure performed during the second trimester of pregnancy. In pointing out that Congress’ alleged justification was put forth in bad faith, Ginsburg dissents, arguing that:

Today’s ruling, the Court declares, advances . . . the Government’s ‘legitimate and substantial interest in preserving and promoting fetal life.’ . . . But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a method of performing abortion. (Gonzales at 181, dissenting).

While preserving life is not a constitutionally illegitimate rationale, Congress did not proffer it in good faith, or so Ginsburg suggests. After all, the law only targets a particular method of abortion, leaving a doctor other ways to perform an abortion. Hence the law does not save one fetal life. Ginsburg concludes that something else besides preserving life is actually afoot. Ginsburg goes on to suggest that:

Ultimately, the Court admits that ‘moral concerns’ are at work, concerns that could yield prohibitions on any abortion . . . Notably, the concerns expressed are untethered to any ground genuinely serving the Government’s interest in preserving life . . . ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’ [citing Lawrence]. Gonzales at 182, dissenting.

Ginsburg even cites Lawrence for the proposition that mere moral considerations are an illegitimate rationale for lawmaking.
c. “Catchall” Reason

Schwarzenegger describes this reason as standing in for a yet unarticulated possible legitimate purpose for banning same-sex marriage. Proponents of the ban on same-sex marriage advance “[a]ny other conceivable legitimate interests identified by the parties, amici, or the court at any stage of the proceedings” to justify such legislation. But, as Schwarzenegger makes clear, the proponents have been unable to “identity any rational basis” for banning same-sex marriage. Simply saying that there is a possible legitimate purpose for a law is not enough to sustain it. After all, this would mean that a court could not strike down any law under rational review.

2. Illegitimate or Inadmissible Reasons

If there are no constitutionally legitimate reasons for banning same-sex marriage, what are the possible reasons for doing so? Schwarzenegger concludes that:

[i]n the absence of a rational basis, what remains of proponents’ case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislation.141

Reasons relating to mere disapproval or mere animus are not constitutionally inadmissible under a rational review analysis. That means that any law or policy based on these reasons or rationales is unconstitutional. Schwarzenegger specifically says that Proposition 8 may be based on the belief that a certain kind of relationship is “inherently” better than another. This language affirms the principle that conceptions of the good life are inadmissible in justifying laws and policies under the equal protection clause. Schwarzenegger endorses this feature of liberal neutrality. These reasons include mere tradition, mere moral superiority, and animus. This Article suggests that the Court’s jurisprudence rejects each as a possible reason for a law under rational review.

141 Schwarzenegger at 1002.
Disestablishment of Marriage

a. Mere Tradition

It is relatively easy to dismiss this as a possible reason for bans on same-sex marriage. This kind of reason is simply circular. Simply suggesting that the state has always done something a particular way is not a constitutionally sufficient reason, on its own, to maintain the practice. In Lawrence v. Texas (2003), a case this Article discusses in more detail below, the Court invalidated sodomy laws rejecting mere tradition as a legitimate reason for affirming such legislation. The Court held that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”142 Lawrence goes on to make clear that “neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”143 And, as this Article argues below, the Court invalidated the sodomy law under a rational review standard. Cass Sunstein argues that the equal protection clause is nothing other than a “sober second thought to legislation or the defense of tradition against pent-up majorities.”144

Certainly, invalidating a practice that has been in place for a long time may have unintended consequences, consequences that may be legitimate in deeming the practice constitutional.145 But in that case it is not just tradition per se that is doing the work but rather the consequences that will arise from failing to follow it. And it is precisely this argument that Schwarzenegger rejects in the context of same-sex marriage. Schwarzenegger suggests that the “evidence shows that the state advances nothing when it adheres to the tradition of excluding same-sex couples from marriage. Proponents’ asserted state interests in tradition are nothing more than tautologies and do not amount to a rational bases for Proposition 8.”146 That is, those defending bans on same-sex marriage simply look to tradition in positing a legitimate rationale for the law

142 Lawrence at 577

143 Lawrence at 577-578 (quoting Bowers at 216 (1986), dissenting).

144 Sunstein, supra note 94, at 1174.

145 See generally Forde-Mazrui, supra note 118 (arguing that tradition may be sufficient to pass the most deferential rational review standard). Concludes that benefits that may accrue to preserving tradition are “maintaining predictability and settled expectations, reinforcing the community identity of those who define themselves based in part on the tradition, and avoiding unintended consequences of change.” Ibid at 309.

146 Schwarzenegger at 998.
rather than pointing to the alleged adverse consequences that would arise from invalidating such marriage limitations. The mere appeal to the fact that the state has done something one way cannot be a sufficient rationale to uphold the practice and so mere tradition cannot save a law from constitutional attack.

b. Mere Moral Superiority

In Lawrence v. Texas (2003), the Court invalidated same-sex sodomy laws reasoning, in part, that “morals legislation” is unconstitutional. In line with the claims of liberal neutrality or anti-perfectionism, this Article suggests that morals legislation is best understood as legislation that is based on a conception of the good life, on the basis of a belief that a particular way of life is worthwhile for its own sake. Writing for the majority, Justice Anthony Kennedy held that sodomy is protected under a constitutional right to privacy. Most of the opinion focuses on this argument. This Article does not analyze the fundamental right to privacy argument, focusing instead on the fact that Court in Lawrence also holds a law fails rational review if based solely on moral considerations. Toward the end of the opinion, Justice Kennedy quotes Justice John Paul Stevens’ dissent in Bowers v. Hardwick (1986), an earlier case that had upheld sodomy laws. Lawrence explicitly relies on Stevens’ words to invalidate the sodomy statute:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.147

This is the crux of the Lawrence decision. It not only expands the right of privacy to include gay sex but also, relevant to a rational review analysis, deems constitutionally inadmissible laws and policies prohibiting a practice based simply on the idea that a majority finds it immoral.

By quoting Stevens’ dissent, the Lawrence Court affirms that such moral rationales are unconstitutional. The opinion states that morality is “not [a]

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147 Lawrence at 577-578 (quoting Bowers at 216 (1986), dissenting) (emphasis added)
sufficient reason for upholding a law prohibiting the practice [of sodomy].”

It does not say that laws that interfere with fundamental rights such as the right to privacy may not be based on morals. In fact, the Court states that the gay sodomy statute furthers no “legitimate state interest.” This is undoubtedly the language of rational review—applying to all laws and policies. The majority could have said that the statute furthers no “compelling state interest” thereby leaving the door open for perfectionist rationales to justify non-fundamental-interest-violating laws, but it did not.

The Court did not subject the sodomy law to heightened scrutiny under this prong of the analysis. Rational review was sufficient to invalidate it. The decision informs what constitutional law already recognizes as the “police powers” of the state. Traditionally, these powers have included the health, safety, and morals of the public. Lawrence repudiates the morals component of these powers. Suzanne Goldberg argues that Lawrence merely makes explicit this ban on morals legislation, a ban that was already immanent in the Court’s earlier jurisprudence. Suzanne Goldberg argues that

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148 Lawrence at 577

149 Lawrence at 578


151 Suzanne B. Goldberg, Morals-Based Justifications for Lawmaking Before and After Lawrence v. Texas, 88 MINN. L. REV. 1233, 1261-81 (2004). For example, in Reynolds v. US 98 U.S. 145 (1878) and Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). The Court partially appealed to non-morality based (neutral) language in failing to provide constitutional protection for bigamy and obscenity, respectively. Goldberg at 1261-81. The Reynolds decision, as Goldberg interestingly points out, never once uses the word “morality.” In that decision the Court argues that “polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy,” Goldberg at 1264 (quoting Reynolds, 98 U.S. at 166). thereby looking to harm and not just morality. Similarly, in Paris Adult Theatre I, the Court noted that this case “goes beyond whether someone, or even the majority, considers the conduct depicted as ‘wrong’ or ‘sinful’.” Goldberg at 1269 (quoting Paris Adult Theatre I, 413 U.S. at 69).

This was not the language of Bowers where the majority's moral disapproval was deemed sufficient on its own to uphold sodomy laws. Instead, the Paris Adult Theatre I decision reasoned that “States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize ... the States’ right ... to maintain a decent society.” Goldberg at 1270 (quoting Paris Adult Theatre I, 413 U.S. at 69).
Rather than representing a break with tradition, Lawrence reflected the Court's long-standing jurisprudential discomfort with explicit morals-based rationales for lawmaking. Notwithstanding its ubiquitous rhetorical endorsements of government's police power to promote morality, it turns out that the Court has almost never relied exclusively and overtly on morality to justify government action. Indeed, since the middle of the twentieth century, the Court has never relied exclusively on an explicit morals-based justification in a majority opinion that is still good law.\textsuperscript{152}

So while the state may act on reasons relating to health and safety, it may not act upon only moral justifications.\textsuperscript{153} Important here is that morals legislation is best understood as nothing other than legislation based on a conception of the good life; in this case, the belief that gay sex is morally wrong or intrinsically inferior to its heterosexual counterpart. Morals legislation is legislation that is not based on extrinsic or public benefits but on the idea that a particular way of life is simply better for the individual who practices it. Morals legislation is legislation based on perfectionist reasons.

\textit{Lawrence} makes clear that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime. . . are central to the liberty protected by the Fourteenth Amendment."\textsuperscript{154} This liberty entails the freedom "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."\textsuperscript{155} This "concept of existence" is nothing other than a conception of the good life. The language of "mystery" and "meaning" points to the idea that these beliefs are not about what has extrinsic or public benefits. Hence, the Court’s concession in an earlier case that homosexuality counts as a "victimless" crime.\textsuperscript{156} Rather, these beliefs are about what lives have intrinsic value, beliefs that \textit{Lawrence} holds the state may not impose on its members. \textit{Lawrence} informs a core idea of liberal neutrality that individuals ought to be free to define their "own concept of meaning."

Justice Antonin Scalia’s dissent supports this reading of \textit{Lawrence}. Justice Scalia focuses on the real import of the decision when he writes that most “of

\textsuperscript{152} Goldberg, supra note 151, at 1235-1236.

\textsuperscript{153} BEDI, supra note 27, at Ch. 7; See also Sonu Bedi, \textit{Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete}, 53 CLEV. ST. L. REV. 447.

\textsuperscript{154} \textit{Lawrence} at 574.

\textsuperscript{155} \textit{Lawrence} at 574.

\textsuperscript{156} \textit{Bowers v. Hardwick} (1986): 195.
Disestablishment of Marriage

the [majority] opinion has no relevance to its actual holding—that the Texas statute ‘furthers no legitimate state interest which can justify’ its application to petitioners under rational-basis review.” Justice Scalia believes that the majority opinion renders constitutionally suspect laws “against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.” In so far as these laws are based on the idea that some way of living is worthwhile for its own sake, Scalia may be right.

In fact, Justice Sandra Day O’Connor’s concurrence in Lawrence focuses just on the meaning of the equal protection clause. For her, the question is “whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy.” O’Connor answers in the negative. According to her, “[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.” O’Connor importantly articulates moral disapproval and animus as two reasons or rationales that are constitutionally inadmissible. This Article considers animus below. She makes clear that the Court has “never held that moral disapproval, without any other asserted state interest, is

157 Lawrence at 586, dissenting
158 Lawrence at 599, dissenting
159 See also JED RUBENFELD, Revolution by Judiciary: The Structure of American Constitutional Law (2005) 184-190, 189. (arguing that this interpretation of Lawrence would mean that nondiscrimination legislation would “certainly be unconstitutional under a principle that the state may not legislate morality. Discrimination inflicts no force or fraud on anyone.”). But Rubenfeld fails to realize that a ban on morals legislation is best interpreted as a ban on appealing to conceptions of the good in justifying legislation, in line with the claims of liberal neutrality. Certainly, it would be hard pressed to view a law banning racial discrimination in employment as resting on a belief that a particular way of life—here an employer not discriminating on the basis of race—is worthwhile for its own sake. After all, laws like Title VII have extrinsic benefits, benefits that accrue to others. See, e.g., BEDI, supra note 27; Manuel Possolo, Morals Legislation After Lawrence: Can States Criminalize the Sale of Sexual Devices? 65 Stan. L. REV. __ 3 (forthcoming March 2013) (arguing that a ban on the use of sex toys is unconstitutional under Lawrence) (“There has been a marked shift in the Court’s jurisprudence on this point, starting with equal protection and making its way into substantive due process. The Court has become increasingly suspicious of laws that it considers to be based on nothing more than moral disapproval.”)

160 Lawrence at 582, concurring (emphasis added)
161 Lawrence at 582, concurring
a sufficient rationale under the equal protection clause to justify a law that discriminates among groups of persons.” While O’Connor says that moral disapproval or animus must be aimed at “groups,” the Court makes clear in Willowbrook v. Olech (2000), a case this Article discusses below, that animus against a lone individual is also unconstitutional.

By so invaliding morals legislation, the Court effectively holds that as a constitutional matter laws and policies may not be based on conceptions of the good, on what the state deems as a worthwhile or meaningful life for its own sake. The language of “without any other asserted state interest” points to the idea that the state may not act on perfectionist morals beliefs about what ways of living are intrinsically good. A mere belief that a particular way of life is wrong or “immoral” is not a sufficient reason to ban it. This is why Lawrence says the Court’s “obligation is to define the liberty of all, not to mandate [its own] own moral code.” Laws violate equal protection in so far as they rest on a particular “moral code.”

The principle that favoring a way of life for its own sake is unconstitutional is also present in Cleburne v. Cleburne Living Center (1985). Again, in Cleburne, the Court invalidated a city ordinance that required a permit in order to establish a home for the mentally challenged. Whereas Lawrence concerned a criminal law (the law criminalized gay sodomy) Cleburne concerned a simple permit requirement. But the logic of the Court’s analysis was essentially the same. Without imposing any kind of higher scrutiny, the Court invalidated the requirement holding that the state may not single out a particular living arrangement for adverse treatment. The city did not require a permit for homes used for other purposes such as “apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged.” The Court refused to deem the mentally challenged a suspect class. Without imposing any kind of higher scrutiny, the Court held that under the equal protection clause, there were no “legitimate interests” that justified treating a certain living arrangement, in this case a home for the mentally challenged, differently from others. The Court concluded “that requiring the permit in this case appears . . . to rest on an irrational prejudice against the

162 Lawrence at 582, concurring
163 528 U.S. 562 (2000)
164 Lawrence at 571
165 Cleburne at 447
166 Cleburne at 442-448
Disestablishment of Marriage

mentally retarded.”

The city permitted many others kinds of living arrangements, many other purposes for using a dwelling. Individuals could start a fraternity or a hospital with no sanction needed from the state. But they could not start a home for the mentally challenged without obtaining a permit. The Court held that since there was no legitimate reason justifying this kind of disfavor of a particular living arrangement, such a policy violates the equal protection clause. This affirms the principle that it is unconstitutional for the state to act on the idea that a particular way of life is intrinsically inferior. In Cleburne, the disfavored way of life was a home for the mentally challenged. In Lawrence, the disfavored way of life was homosexuality. In both cases, the state acts on reasons that are constitutionally inadmissible.

The ban on morals legislation informs liberal neutrality. In asking “whether a majority of citizens could use the power of the state to enforce ‘profound and deep convictions accepted as ethical and moral principles’ . . . through regulation of marriage license,” Schwarzenegger argues “they cannot.” This is why Schwarzenegger concludes that bans on same-sex marriage are based on

167 Cleburne at 448

168 See also West Virginia v. Barnette (1943) (holding that a law forcing students to recite the Pledge of Allegiance was unconstitutional). (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.” Ibid at 642).

While Barnette arose from a free exercise challenge to the flag salute, the Court did not to base its decision on the fact that this kind of compelled salute violates a right to religion. The issue does not, as the Court reasons:

turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty. Barnette at 634-635.

This informs the holding in Lawrence and Cleburne. If the state may not compel individuals to salute a flag, it may not compel individuals to lead a particular way of life for its own sake. It may not, for instance, simply favor heterosexuality over homosexuality or simply favor fraternity houses over houses for the mentally challenged.

169 Schwarzenegger at 1002
nothing other than disapproval of gay and lesbian relationships.

c. Animus

A law based on simple dislike of or hostility is also unconstitutional. It is not based on anything other than the idea, for instance, that being black or being gay is inherently inferior or even disgusting. Disgust is merely an emotion and a particularly viscerally one at that. Here the reason or rationale is not the inferiority of a particular way of life but hostility to a particular group or class. Hating an individual for no other reason than the fact he or she is a member of a group is a constitutionally illegitimate reason. This is, as Cass Sunstein suggests, a “naked preference.” It is naked, because there is nothing underlying the preference except mere dislike or hostility.

In *Yick Wo v. Hopkins* (1886) a unanimous Court held that San Francisco authorities did not have the power under the equal protection clause to grant laundromat licenses to whites but deny such licenses to those of Chinese descent. The Court reasoned that executing a law in this manner was an instance of “arbitrary power.” The Court made clear that “no reason for


172 The flip side of animus is mere favoritism. A law also violates equal protection, if it seeks to favor an individual for no other reason than he or she is a member of a particular group. This is a kind of naked favoritism. Bruce Ackerman argues that central to liberal theory is the principle that no person "is intrinsically superior to one or more of his fellow citizens." ACKERMAN, supra note 7, at 11. This stands as a justificatory constraint on laws and policies. Cass Sunstein argues, in fact, that “[n]eutrality” is the Constitution’s “first obligation”: [g]overnment should not single out particular people, or particular groups, for special treatment. Sunstein , supra note 102, at 2.

In *American Sugar Refining Company v. Louisiana* (1900), the Court upheld a tax on sugar refineries that exempted "planters grinding and refining their own sugar and molasses." Sugar Refining at 92 The Court reasoned that this exemption was not "arbitrary, oppressive, or capricious" or a case of "pure favoritism." Sugar Refining at 92

173 *Yick Wo* at 370
Disestablishment of Marriage

[such discrimination] exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified.”174 The Court did not impose any kind of higher scrutiny in realizing that this action by government was based on racial animus. The Court did not say that racial discrimination by authorities rendered their action presumptively unconstitutional in line with a principle of strict scrutiny. Rather, the Court says that there is “no reason” for such discrimination without imposing heightened scrutiny.

Similarly, the Court struck down a Colorado Amendment that banned protection for gays and lesbians in Romer v. Evans (1996) for precisely the same kind of constitutionally inadmissible rationale. The Amendment prohibited any local or city ordinance from making discrimination on the basis of homosexuality illegal. The Court struck down the Amendment under the equal protection clause. As the Court has yet to deem sexual orientation a suspect classification, it did not subject the Amendment to higher scrutiny. This did not stop the Court from realizing that the "reasons offered for. . . the amendment" must be nothing other than "animus towards the class" in this case, gays and lesbians.175 In particular, the Court held that the Amendment raised:

the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."176

It is not simply the disadvantage imposed by the law that is doing the constitutional work. Rather, Romer makes clear that such disadvantage is “born of animosity,” that such disadvantage is based on hostility against gays and lesbians. This is what renders the Amendment unconstitutional.

The Ninth Circuit court of appeals in Perry v. Brown (9th Cir. 2012) draws from this logic to invalidate Proposition 8, a state constitutional ban on same-sex marriage. After the California Supreme Court invalidated that state’s ban on same-sex marriage under the California state constitution,177 the voters of California amended their constitution by initiative to un-do the ruling. Judge

174 Yick Wo at 374

175 Romer at 632

176 Romer at 634

177 In re Marriage, 43 Cal. 4th 757 (Cal. 2008)
Stephen Reinhardt, writing the opinion, reasoned that “taking away” the right of gays and lesbians to marry under the California Constitution violated the equal protection clause. The case did not decide the ultimate issue of whether a state ban on same-sex marriage violates the U.S. Constitution. Nevertheless, a rational review analysis was sufficient to strike down Proposition 8 in Perry, just as it was sufficient to doom Colorado’s Amendment 2 in Romer.

Proposition 8 is remarkably similar to Amendment 2. Like Amendment 2, Proposition 8 “single[s] out a certain class of citizens for disfavored legal status. . . .” Like Amendment 2, Proposition 8 has the “peculiar property,” of “withdraw[ing] from homosexuals, but no others,” an existing legal right—here, access to the official designation of ‘marriage’—that had been broadly available, notwithstanding the fact that the Constitution did not compel the state to confer it in the first place. (citations omitted).

Perry argued that this withdrawal of the right to marry rested on mere “disapproval of gays and lesbians.” Simply put, “Proposition 8 enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class.” And this judgment, this bare “desire to harm. . . cannot constitute a legitimate governmental interest” under rational review.

Romer makes clear that the Amendment constitutes "arbitrary discrimination." It is arbitrary, because any group could be subject to such animus. Justice Scalia’s dissent in Romer fails to appreciate the logic of this

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178 Perry at 1085

179 “Whether under the Constitution same-sex couples may ever be denied the right to marry, a right that has long been enjoyed by a opposite-sex couples, is an important and highly controversial question. . . . We need not and do not answer [this] broader question in this case. . . .” (Perry at 1064).

180 Perry at 1080-1081

181 Perry at 1093

182 Perry at 1094

183 Perry at 1094. In fact, even the dissenting judge in Perry concedes that interests such as “animus, negative attitudes, fear, a bare desire to harm, and moral disapproval. . . alone will not support the constitutionality of a measure” under the equal protection clause.” Perry 1102, dissenting.

184 Romer at 630
Disestablishment of Marriage

approach. He implies that the majority opinion cares only about prejudice against gays and lesbians not against those who for instance “went to the wrong prep school” or eat “snails” or who even hate “the Chicago Cubs.”

But Scalia simply fails to realize that this rational review prong of equal protection doctrine is not about particular groups or classes but the reason or rationale underlying a law. After all, the rational review equal protection prong does not first require identifying a disadvantaged group. A law based on hostility against those who eat snails or those who hate the Chicago Cubs would be unconstitutional in just the same way as the Colorado Amendment.

Daniel Farber and Suzanne Sherry insightfully interpret Romer—and by implication Perry—as embodying what they call a “pariah principle,” a principle that “forbids the government from designating any societal group as untouchable.”

Consider a Colorado amendment that prohibited local and city ordinances from making discrimination on the basis of eye color illegal or a California initiative that defines marriage as a between individuals with a particular color of hair. Replacing these amendments with other group characteristics would not make the amendment any less constitutional. Animus is arbitrary, precisely because any group can be subject to it. In fact, Akhil Amar argues that Romer is best understood as embodying the Constitution’s ban on “bills of attainder.”

The “logic and spirit” of the non-attainder clause prohibits legislative majorities from singling out individuals or groups for who they are and not what they have done. Schwarzenegger holds that bans on same-sex marriage are unconstitutional if based on animus against gays and lesbians.

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185 Romer at 652-653

186 See also Part IV(B)(iv).


189 Ibid at 208. As Amar interestingly points out, the plaintiffs seeking to overturn racial segregation in Bolling v. Sharpe, 347 U.S. 497 (1954) specifically invoked the attainder clause: “Jim Crow laws, plaintiffs argued, had the purpose and effect of stigmatizing blacks- not for what they did, but for who they were. And that, plaintiffs argued, was a kind of attainder, a legislatively imposed stain and taint.” Amar, supra note 188, at 208-209.
C. Establishment Clause

The Establishment Clause of the First Amendment also stands as a doctrinal way to invalidate prohibitions on same-sex marriage. No court has yet endorsed this approach. But Gary J. Simson, one of few scholars who does invoke the constitutional principle of non-establishment to challenge same-sex marriage, argues that laws “prohibiting same-sex marriage are extremely difficult to understand in secular terms and extremely easy to understand in religious terms.”

The Court has interpreted the Establishment clause to embody a commitment to religious neutrality. Edward Rubin suggests that the idea of neutrality is the “leading interpretation of Establishment clause.” The Court’s jurisprudence on neutrality looks to three tests in determining whether a law violates the Establishment clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [citations omitted] finally, the statute must not foster ‘an excessive government entanglement with religion.’

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190 Amendment I (“Congress shall make no law . . . respecting an establishment of religion.”)


193 Edward Rubin, Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause, 63 Vand. L. Rev. 763, 785 (2010) (arguing that bans on assisted suicide violate the Establishment clause) (“Establishment Clause doctrine in general centers around three basic principles, which can be described—moving from most to least restrictive on governmental action—as strict separation, neutrality, and accommodation. Strict separation . . . sees the First Amendment as having erected a “high and impregnable” wall between church and state and as creating an essentially secular government. Its stringency has led to its decline in recent years and to its displacement by the principle of neutrality. Neutrality forbids government from favoring one religion over another, but is distinguishable from strict separation, at least in theory, because it also forbids the government from favoring secularism over religion. . . .

The third principle, frequently described as accommodation, reflects the Court's more sympathetic treatment of religion in recent years. It permits the government to acknowledge and accommodate the religious character of the American people and only invalidates laws that coerce religious activity or fail to treat different religions equally.” Ibid at 785-786).
Disestablishment of Marriage

citations omitted].” This section primarily focuses on the first test, the requirement that the law have a secular purpose. After all, if the law fails this test, it clearly violates the Establishment clause. Michael Perry argues that this principle of non-establishment means that “laws for which the only discernible rationale is an offending religious rationale” are constitutionally illegitimate.

In *Epperson v. Arkansas* (1968) (invalidating an Arkansas law that forbade the teaching of evolution in public schools) the Court affirms this core principle arguing that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” In *McCreary County v. ACLU* (2005) the Court held that a Ten Commandments display in a courthouse violated the Establishment clause. The Court made clear that this standard of neutrality is one of purpose or justification:

When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.

Laws or policies based on the idea that a particular religious way of life is superior to another or that religion is superior to a non-religious way of life are unconstitutional. This is why Justice O'Connor famously suggests that by

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194 See generally Lemon v. Kurtzman, 403 U.S. 602 (1971) at 612-613

195 Michael Perry, Religion as a basis of law-making? Herein of the non-establishment of religion, *PHILOSOPHY SOCIAL CRITICISM*, 35 (1-2): 105, 114 (2009). Even if liberal political theorists may disagree over the legitimacy of invoking religious justifications for laws and policies (see supra note 19), it is hardly controversial that such justifications are generally unconstitutional in the United States. Ibid.

196 393 U.S. 97 (1968)

197 *Epperson* at 104

198 545 U.S. 844 (2005)

199 *McCreary* at 860

200 See, e.g., For example, in *Thorton v. Caldor*, 472 U.S. 703 (1985) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Court struck down on establishment grounds a Connecticut statute that provided Sabbath observers with an absolute and unqualified right not to work on their day of Sabbath and a Texas sales tax exemption for religious periodicals, respectively.
favoring such a religious way of life, the state sends a message to “nonadherents” that they are “outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.”

Rather than finding reasons that all—adherents and nonadherents—can share, the state endorses a particular religious conception of the good life.

There is an underlying logic that connects Lawrence to the cases decided under the Establishment clause. Laws and policies based on only moral

In these two cases, religion was so advantaged as to run afoul of the establishment clause. In Thorton, the Court held that the Connecticut statute did not have a secular purpose. By imposing on employers “an absolute duty to conform their business practices to the particular religious practices of the employee” the statute advances religion. Thorton at 708-710. In smoking out this illegitimate purpose, the concurring opinion realizes that the exempting statute does not afford non-religious practices similar accommodation. Ibid, concurring at 711.

Similarly, in Texas Monthly, the Court invalidated a Texas law that gave a sales tax exemption only to religious periodicals. The exclusive nature of the tax—like its counterpart in Thorton—suggested that an illegitimate purpose was afoot. The rationale was not secular. Texas Monthly at 15. As the Court reasoned, Texas could not claim that it sought to subsidize, by an exemption, the community’s cultural and intellectual character, an otherwise legitimate rationale. Since the exemption applied only to religion and no other cultural or intellectual groups, this could not have been the purpose. Ibid at 15-16. Consequently, these kinds of law fail constitutional muster. But see Walz v. Tax Commission of City of New York (1970), the Court upheld a New York law under the establishment clause that granted a tax exemption for “religious, educational or charitable purposes.” Walz at 666-667. Here, unlike Thorton and Texas Monthly, the legislation did not seek to advance religion. The Court reasoned that the New York law did not single:

out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. Walz at 673.

Because the law exempted other non-profit groups including religion, the “legislative purpose of [the] property tax exemption is neither the advancement nor the inhibition of religion.” Walz at 672.


202 See Andrew D. Cohen, How the Establishment Clause Can Influence Substantive Due
Disestablishment of Marriage

reasons are unconstitutional for exactly the same principle as laws based on religious considerations. Both point to a doctrinal commitment that legislation must have in the language of a pivotal case concerning public funds and religious schools, a “secular legislative purpose.”203 Just as individuals may disagree about what kind of sexual and intimate life is worthwhile “for [its] own sake,” so too may individuals disagree about the importance and relevance of faith in our own lives. After all, Lawrence describes this freedom as the liberty to define one’s own concept of “meaning, of the universe, and of the mystery of human life.” The state ought to remain neutral with regards to such conceptions of the good.

Edward Foley, one of the few scholars who recognizes the connection between public reason and non-establishment,204 argues:

The Establishment Clause, properly construed, is the Constitution’s textual embodiment of this idea of political liberalism: the basic purpose of including the Establishment Clause within the Bill of Rights was to prohibit the new federal government from developing an allegiance to any of the various religious belief-systems that then existed, or that might come to exist, within American culture.205

This illuminates the similarity between laws that seek to regulate sexuality and religion. Laws that prohibit a certain religious practice or a certain consenting sexual practice are based on perfectionist reasons. These kinds of reasons based on conceptions of the good life are ruled out by the Constitution. Schwarzenegger brings together the unconstitutionality of same-sex marriage, Lawrence’s repudiation of morals legislation, and the Establishment clause in concluding that:

Process: Adultery Bans After Lawrence, 79 FORDHAM L. REV. 605 (reasoning that adultery bans are unconstitutional given Lawrence and the Establishment clause).


204 See also GREENAWALT, supra note 7, at 62-71; SCHWEBER, supra note 11 at 184; CASS SUNSTEIN, Partial Constitution (Harvard Press) (1993) at 17 (Sunstein argues that American constitutional law is indeed about a “republic of reasons.” Importantly, the “required reason must count as a public regarding one. Government cannot appeal to private interest alone.”)

A state’s interest in an enactment must of course be secular in nature. The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose. [citing Lawrence and Everson v. Board of Ed. (1947)] Perhaps recognizing that Proposition 8 must advance a secular purpose to be constitutional, proponents abandoned previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples.206

Schwarzenegger cites Lawrence and Establishment clause jurisprudence in invalidating California’s ban on same-sex marriage.207

The problem of course is that those states that do ban same-sex marriage will not candidly admit that religious reasons are doing the underlying work.208 In fact, this is why the proponents of Proposition 8 in Schwarzenegger specifically refused to invoke such reasons in justifying California’s ban on same-sex marriage.209 Rather, proponents have unsurprisingly sought to justify such bans by appealing to arguments of responsible procreation, tradition, and preserving the current institution of marriage. But, as demonstrated above, these arguments are either circular or proffered in bad faith. Once we realize that these justifications are inapplicable, the Establishment clause carries serious constitutional weight as an important way to invalidate such limitations on marriage.

III. Why Marriage itself is Unconstitutional under Rational Review and/or the Establishment Clause

If the rational review and Establishment clause approaches succeed in invalidating prohibitions on same-sex marriage, these approaches also suggest that marriage laws themselves are unconstitutional. There are four parts to this argument, parts that bring together the claims of anti-perfectionism and the constitutional difficulties with bans on same-sex marriage. First, child

206 Schwarzenegger at 930-931

207 For an argument about the novel nature of this argument that draws from Lawrence and the Establishment clause see Clifford J. Rosky, Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law, 53 ARIZ. L. REV. 913 (2011).


209 Schwarzenegger at 997-1002.
Disestablishment of Marriage

rearing/responsible procreation or maintaining marriage in order to maintain it cannot be a possible legitimate basis for marriage laws. These interests are circular or proffered in bad faith. Moreover, any possible secular purpose for marriage laws only explains the conferral of civil union status not the label of marriage. Second, the only possible reasons for the state’s conferral of marriage turn out to be constitutionally inadmissible. Third, the constitutional right to marry approach is inapplicable in defending marriage laws themselves. Fourth, we must be careful in separating the constitutional violation from the appropriate remedy.

A. Reasons that are Circular or Proffered in Bad Faith

The equal protection rational review approach holds that certain reasons for banning same-sex marriage are circular or proffered in bad faith. The same logic applies to the justifications for marriage itself.

1. Maintain Marriage in order to Maintain Marriage

It will not suffice for a state to argue that marriage laws must be maintained in order to maintain marriage. That kind of circular logic did not hold in justifying bans on same-sex marriage. Again, if maintaining an institution in order to maintain it is a legitimate reason, a court would be unable to strike down any kind of law or policy. After all, striking down a law invariably means a change, alteration, or abolition of a preexisting institution. Certainly, disestablishing civil marriage will abolish the marriage label. Similarly, invalidating prohibitions on same-sex marriage will alter or change the “traditional” meaning of marriage. But just as this this kind of concern about tradition qua tradition was not a legitimate reason for banning same-sex marriage, it cannot be a legitimate reason on its own for maintaining the label of marriage.

2. Child Rearing /Responsible Procreation

It will also not suffice to posit child rearing/responsible procreation as a justification for civil marriage. Again, as the debate over the constitutionality of same-sex marriage makes clear, the state does not confer the label of marriage in light of any procreative concerns. Two individuals of the opposite sex who have no desire to procreate may marry. And under the theory that bans on same-sex marriage are unconstitutional, two individual of the same sex may marry, with no possibility of procreation between them. If that’s the case, the state cannot appeal to child rearing/procreative concerns to now justify marriage itself. Just as these reasons were proffered in bad faith to justify bans
on same-sex marriage under a rational review analysis so too are they inapplicable to justify marriage itself.

3. Any Possible Secular Purposes Only Explains Civil Unions not Marriage

The state cannot simply argue that marriage is based on the legal benefits, burdens, and responsibilities that accompany it. It cannot explain civil marriage by simply pointing to economic justifications relating to inheritance, social security, pension benefits, taxes, or other kinds of secular reasons relating for instance to spousal rights about health care or funeral arrangements. Such reasons only explain civil unions. They do not explain the intangible good that comes with the label of marriage. If the justifications were the same, the label would be irrelevant. States cannot justify marriage laws as if they were civil unions. This would point to an unconstitutional mismatch between alleged secular ends (e.g., regulating inheritance) and the means used to effectuate them, deploying the crucial label of marriage. Any possible secular reason only goes far enough in explaining civil unions. As the debate over same-sex marriage makes clear, marriage and civil unions are not the same.

B. Only Illegitimate Purposes Remain

This Article argues that only constitutionally illegitimate purposes therefore remain to justify civil marriage. These purposes include the tradition of marriage, the religious underpinning of marriage, the morally special status of marriage or animus against unmarried individuals.

i. Tradition of Marriage

Now the Court has asserted on numerous occasions that marriage is "the most important relation in life,\textsuperscript{210} that it is "fundamental to the very existence and survival of the race.\textsuperscript{211} But we ought to be quite wary of the constitutionality of these kinds of arguments, ones that invariably look to tradition \emph{qua} tradition simply asserting that a particular practice is allegedly crucial to the maintenance of society. And this language is inconsistent with more recent cases like \emph{Lawrence} that proclaim that "neither history nor

\textsuperscript{210} \emph{Maynard} at 205

\textsuperscript{211} \emph{Skinner v. Oklahoma} (1942) at 541
Disestablishment of Marriage

“tradition” can save a law from “constitutional attack.” 212 Again, it will not suffice to point out that the state has always married individuals, so it ought to continue to do so. This kind of appeal to tradition would easily justify any kind of practice. After all, those who defend prohibitions on same-sex marriage often make appeals to these very arguments. For instance, those who defend prohibitions on same-sex marriage often invoke the argument from tradition, contending that marriage is indeed the foundation of society. Redefining it will therefore undermine society. But same-sex marriage is already a reality in nine American states with no signs of societal decay or crumbling. These appeals to public welfare are just convenient canards that mask justifications that rest on controversial moral or even religious premises. The logic of this canard, then, is evident in the justification of civil marriage itself. Here too appeals to tradition or some idea of public welfare mask a belief that marriage confers a morally special status, a status that is unavailable to other relationships. That it provides, as much natural law suggests, certain intrinsic goods that benefit those individuals who undertake the marriage contract.

ii. Religious Underpinning of Marriage

The Establishment clause invalidates those laws and policies that have a religious purpose. The religious neutrality interpretation of the clause calls into question legislation that cannot be justified other than by appeal to religion. As noted above, the status of marriage may very well rest on a religious underpinning thereby implicating the Establishment clause.

Now the Court has rejected Establishment clause objections in those cases where the law may have had its origin in religion but no longer does. In such cases, the law has shed its religious character, leaving only a secular purpose. This was the case in a series of cases upholding Sunday Closing laws, laws that require businesses close on Sunday. 213 In Two Guys from Harrison-Allentown v. McGinley (1961), the Court conceded that Pennsylvania’s closing laws, Section 4651:

still contain some traces of the early religious influence. The 1939 statute refers to Sunday as “the Lord's day”; but it is included in the general section entitled, “Offenses Against Public Policy, Economy and Health.” [Section 4651]. . .uses the term “Sabbath Day” and refers to the

212 Lawrence at 577-578

other days of the week as “secular days.” But almost every other statutory section simply uses the word “Sunday” and contains no language with religious connotation. It would seem that those traces that have remained are simply the result of legislative oversight in failing to remove them. Section 4651 was re-enacted in 1959 and happened to retain the religious language; many other statutory sections, passed both before and after this date, omit it.\footnote{Two Guys at 594.} . . .

[We] find that the 1939 statute was recently amended to permit all healthful and recreational exercises and activities on Sunday. This is not consistent with aiding church attendance; in fact, it might be deemed inconsistent. And the statutory section, . . . the constitutionality of which is immediately before us, was promoted principally by the representatives of labor and business interests. Those Pennsylvania legislators who favored the bill specifically disavowed any religious purpose for its enactment but stated instead that economics required its passage.\footnote{Two Guys at 595.}

The Court held that these Sunday closing laws no longer had a religious underpinning but sought to offer the weekly laborer a day of rest and repose to improve overall productivity.\footnote{Braunfeld at 607. (“[W]e cannot find a state without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation, and tranquility—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself. This is particularly true in this day and age of increasing state concern with public welfare legislation.”); McGowan at 444-445.}

But marriage laws are inapposite. They are not similar to Sunday Closing Laws. This is for at least two reasons. First, marriage laws are often not seen as completely secular. The House Report on the Defense of Marriage Act, the federal law now struck down by the First and Second circuit court of appeals, contained language justifying the legislation on religious grounds:

For many Americans, there is to this issue of marriage an overtly moral or
disestablishment of marriage

Religious aspect that cannot be divorced from the practicalities. It is true, of course, that the civil act of marriage is separate from the recognition and blessing of that act by a religious institution. But the fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect. Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.217

Marriage is hardly shorn of its religious and even Judeo-Christian underpinning.218

Second, the label of marriage is not irrelevant. It is precisely the fact that marriage is a kind of status, unlike mere civil unions, that informs its possible religious underpinnings. Marriage is not mere shorthand for civil unions. Again, any alleged secular rationale concerning inheritance, social security, or spousal rights applies to civil unions. Civil unions provide all the secular benefits of marriage, so why does the state still insist on deploying the label of marriage? This label, the purpose of marriage, has not lost its religious character. So if there is a religious underpinning to the label of marriage, the Establishment clause’s commitment to religious neutrality deems it unconstitutional.

iii. Morally Special Status of Marriage

In addition to its possible religious underpinning, marriage laws entail a morally special status. By conferring the label of marriage, the state deems this kind of life, as opposed to an unmarried one, morally special. Again, the state cannot simply argue that marriage is based on the legal benefits, burdens, and responsibilities that accompany it. It cannot simply point to certain economic justifications to explain civil marriage. While this may justify civil unions, it does not explain the intangible good that comes with the label of marriage. If the justifications were the same, the label would be irrelevant. States cannot justify marriage laws as if they were civil unions. This would point to an unconstitutional mismatch between alleged secular ends (e.g., regulating inheritance) and the means used to effectuate them, deploying the crucial label of marriage.

As the debate over same-sex marriage makes clear, marriage and civil unions are not the same. Same-sex marriage proponents see this morally

217 H.R. 3396 at 54-55

218 See generally supra Part IA(ii).
special status as necessary to validate gay and lesbian relationships. Opponents see this status as reason to “protect” it from same sex relationships. In either case, marriage provides a good that civil unions do not. This good is about the morally special status of being married, a status that straightforwardly privileges a conception of the good life that involves romantic companionship. Again, this is why Elizabeth Brake argues that marriage laws are ultimately based on the “belief that marriage and companionate romantic love have special value.” Marriage is not just about instrumental benefits. It is about something more, something that speaks to living a more perfect life. Once we realize that civil marriage laws themselves are a kind of morals legislation, such laws turn out to be unconstitutional. If the state’s reason for a law is the mere fact that a particular way of life is morally superior, in line with a perfectionist rationale, this is a constitutionally illegitimate rationale on which to legislate.

Consider again that Schwarzenegger holds that a ban on same-sex marriage is unconstitutional if it is “simply [based on] a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women.” This is “not a proper basis on which to legislate.” But marriage laws themselves are based on the mere belief that “being married” is inherently better than being unmarried, civilly unionized, or any other kind of arrangement. If marriage is indeed a morally special status—just as opposite sex marriage is a morally special status for many—this calls into question the constitutionality of marriage itself.

iv. Animus against Unmarried Individuals

Marriage may very well also rest on animus against unmarried individuals, on hostility against those who decide not to marry. As Part III makes clear, animus is a constitutionally illegitimate rationale. While cases like Romer and Yick Wo focus on animus against certain disadvantaged groups, animus is unconstitutional even if aimed against a lone individual. In Village of Willowbrook, et al. v. Olech (2000), a case that is often neglected in scholarly work on equal protection, the Court considers what it describes as an equal protection “class of one” case. Grace Olech, the claimant, asked the village

219 Brake, supra note 53, at 88

220 Schwarzenegger at 1002.

221 Schwarzenegger at 1002.

222 Olech at 564. See also Engquist v. Dep’t of Oregon (2008), 553 U.S. 598 (holding that a “class of one” claim may not be made against the government acting as
of Willowbrook to connect her to the local municipal water supply. The village conditioned the connection on Olech granting the municipality a thirty-three foot easement, instead of the standard fifteen-foot easement required of other residents who sought a similar connection. Olech contended that the village treated her differently, because she had filed an unrelated lawsuit against the city. She sued claiming that the village violated the equal protection clause in asking for an additional eighteen feet. Olech did not claim that the city discriminated against her on the basis of an identity classification such as sex, race or sexual orientation. That is, there was no claim that the city treated Olech differently because she was an individual of a suspect class or group.

The district court dismissed the suit, precisely for this reason, holding that an equal protection claim must be identity based in order for it to succeed. The federal appeals court reversed. The appeals court made clear that a claimant “can allege an equal protection violation by asserting that state action was motivated solely by a ‘spiteful effort to ‘get’ him for reasons wholly unrelated to any legitimate state objective.’”223 In other words, as long as the reason for the action is constitutionally inadmissible—here based on nothing but spite—it violates equal protection under a rational review standard. The Court unanimously upheld the appellate decision under rational review, reasoning that the village’s decision to ask for fifteen more feet was “irrational and wholly arbitrary” thereby violating the equal protection clause.224

Employer only when acting as “lawmaker.”) The Court also makes clear that

the class-of-one theory of equal protection on the facts in Olech was not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle. Engquist at 602.

223 Olech at 564

224 Olech at 565. Justice Stephen Breyer’s concurrence suggests that it is the addition of animus in the municipality’s action that triggers the equal protection violation. The village acted with “vindictive action” or “ill will.” Olech at 566, concurring. Breyer makes clear that the village’s decision was not the result of an unintentional arbitrary exercise of power. Rather it was done with “an illegitimate desire to ‘get’ him” or in this case “her.” Again, cases like Romer and Yick Wo point to the presence of hostility or animus as dooming a law under the equal protection clause, Olech at 566, concurring. Scholarly work on Olech wrestles with the issue of whether animus or hostility is necessary in order to make out a successful “class of one” claim, see, e.g., William D. Araiza, Irrationality and Animus in Class-of-One Equal Protection Cases, 34 Ecology L.Q. 493 (2007); Matthew M. Morrison, Comment, Class Dismissed: Equal Protection, the ‘Class-of-One,’ and Employment Discrimination After Engquist v. Oregon Department of Agriculture, 80 U. COLO. L. REV. 839 (2009); Jefferson Powell, Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law, 86
Disestablishment of Marriage

This means that if marriage laws are based on animus or hostility against unmarried individuals, such laws are unconstitutional. The law need not be aimed at a disadvantaged group; after all, there was no allegation of discrimination on the basis of race, sex, or any other such classification in Olech. So even if unmarried individuals do not count as a disadvantaged group, Olech, along with Romer and Yick Wo, stand for the constitutional principle that animus is constitutionally inadmissible no matter whom it is directed at.

C. Constitutional Right to Marry Approach is Inapplicable

We cannot avoid the disestablishment of marriage by simply invoking a constitutional right to marry. In Loving v. Virginia (1967) (invalidating anti-miscegenation laws) the Court held that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”\(^{225}\) In these and other cases, the Court makes clear that there is a fundamental right to marry under the Constitution.\(^{226}\) But in all these cases, the constitutional question concerned state action that limited or regulated the marriage contract, e.g., limited it to those of the same race or those who are not in prison. That is, in these cases, the state treated individuals unequally in granting marriage licenses. None of these cases concerned an instance where the state simply failed to issue marriage licenses altogether. As Cass Sunstein rightly points out: a right to marry is “an individual right of access to the official institution of marriage so long as the state provides that institution.”\(^{227}\) In Perry, the Ninth Circuit court of appeals reiterates this point saying that “the Constitution [does] not compel the state to confer [marriage] in the first place.”\(^{228}\)

With no state action, with no such “official institution,” there is no presumptive constitutional infraction. This is because constitutional rights are negative in character. Rights like the rights to privacy, free speech, religion or the right to bear arms all constrain state action.\(^{229}\) That is, a state violates them

\(^{225}\) Loving at 12


\(^{228}\) Perry at 1081
Disestablishment of Marriage

when it acts in a particular way, when it passes certain laws and policies. The right to privacy, for instance, does not require that the state do anything. It only limits the kinds of laws the state may pass, laws that for instance ban the use of contraception or restrict a woman’s liberty to procure an abortion. The equal protection clause begins with “no state shall...” and the due process clause of the Fourteenth Amendment begins with the words “[n]or shall any state. . .” The Constitution does not contain positive rights, rights that require the state to provide a certain good or benefit. Only when the state acts do constitutional rights become relevant. So if a state banned marriages—passing a law that no private group could “marry” its members, this may very well violate a fundamental right to marry. But in simply disestablishing marriage, refusing to grant the label, there are no marriage laws and hence no state action to challenge. With no state action, the Constitution in this regard does not even apply.

D. Constitutional Violation versus Remedy

Schwarzenegger also dismisses the rationale that the ban on same-sex marriage will result in radical social change, change that must be undertaken slowly or judiciously. Schwarzenegger rejects this kind of rationale reasoning that opening the institution of marriage to those of the same sex will not be disruptive.

Indeed, proponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage. The process of allowing same-sex couples to marry is straightforward, and no evidence suggests that the state needs any significant lead time to integrate same sex couples into marriage.

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229 For purposes of this analysis, this Article treat enumerated and non.enumerated rights in the same way.

230 Griswold v. Connecticut (1965)

231 Roe v. Wade, 410 U.S. 113 (1973)

232 Amendment XIV, U.S. Constitution

233 Amendment XIV, U.S. Constitution; see also Amendment V, U. S. Constitution

234 Schwarzenegger at 998-999

235 Schwarzenegger at 999.
But perhaps invalidating the label of marriage itself is inapposite. While allowing same sex couples may not be disruptive, disestablishing marriage does constitute a radical social change that could have adverse consequences. And this kind of rationale may dovetail into concerns about tradition.

Yet, this constitutional argument misses the distinction between the constitutional violation and the requisite remedy. This Article’s primary focus is on the constitutional violation, the fact that the label of marriage is based on a constitutionally illegitimate rationale. This Article leaves largely to one side the requisite remedy. Similarly, although liberal neutrality suggests that the state get out of the marriage business, it is less clear about what to replace marriage with (if anything).

Ever since Justice John Marshall made clear in *Marbury v. Madison* (1803) that where there is a violation of a right there must be a remedy, constitutional law recognizes that remedies must inevitably follow from a constitutional violation. But even in *Marbury*, Marshall held that although the Court did not have the power to enforce a remedy, a violation had indeed occurred. There is a conceptual and importance difference between a violation and the remedy. A court cannot find that a particular law is constitutional, there is no violation, simply because the remedy may be possibly disruptive to established traditions (conceding that there even would be such disruption). Consider that even in the context of invalidating *de jure* racial segregation, the Court did not suggest a remedy that required integration overnight. Rather, the Court famously suggested in *Brown II* (*Brown v. Board of Education* (1955)) the standard of “all deliberative speed.”

The point is that the issue of remedy is distinct from the constitutional violation. If concerns over the remedy affect the question of constitutional violation, a court would be unable to strike down almost any kind longstanding legislation. For disestablishing any such institution could have alleged adverse consequences.

And this is exactly what occurred in *Baker v. State* (Vt. 1999) when the Vermont Supreme Court invalidated that state’s ban on same-sex marriage. While the constitutional violation occurred because the state did not provide any recognition to same-sex couples, the court refused to “infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate” by requiring that gay couples receive the label of marriage.

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236 5 U.S. 137 (1803)


238 (Brown II) 349 U.S. 294, 301 (1955).
Disestablishment of Marriage

violation from the remedy; leaving the legislature the discretion to craft an appropriate remedy.

So even if marriage is disestablished, conferring the label is unconstitutional, there may be different ways to remedy this violation that may be more suitable than others. And it is in this remedy phase where concerns about disruption ought to be considered. There are ways a court could mitigate such disruption by suggesting a more conservative remedy. For instance, in considering how to remedy marriage laws where a court has found bans on same-sex marriage unconstitutional, Mae Kuykendall interestingly argues that.

If the Court should decide that the marriage laws of states are a violation of equal protection or of a fundamental right, the justices must proceed to choose a remedy. One logical option is to enjoin the issuance of marriage licenses until states cure the identified constitutional problem. Each state could then choose either to end state involvement in marriage entirely or to rewrite marriage law in a way that is constitutional.

Issuing a restraining order would have the merit of avoiding the court's direct involvement in supervising and effectively rewriting state marriage law.240

While Mae’s proposal is about a possible remedy in light of the unconstitutionality of bans on same-sex marriage, it suggests one possible way a court may handle the unconstitutionality of marriage itself. Disestablishing marriage by enjoining the practice could be one kind of remedy that may mitigate and even avoid any possible disruptive consequences (again even conceding that such consequences would exist). Such a remedy would allow states to rewrite laws, perhaps removing the label of marriage issuing civil unions instead, or the state may decide to create another kind of institution that is not based on a morally special status or a religious underpinning. Again, this Article leaves the issue of remedy to one side. What is clear is that marriage laws are unconstitutional given the fact that they rest on a constitutionally illegitimate rationale.

Conclusion

239 Baker at 224-225.

Ultimately, there is a powerful tension between constitutional objections to prohibitions on same-sex marriage and a constitutional defense of the institution of marriage itself. If the rational review and Establishment clause approaches succeed in invalidating bans on same-sex marriage, the institution or label of marriage is constitutionally suspect. If limiting marriage to opposite sex couples rests on a constitutionally illegitimate purpose, so too do marriage laws themselves. Elizabeth Brake, one of the few scholars who actually considers this tension in the context of liberal theory, argues that “[s]ame-sex marriage advocates have argued that it is unjust to define marriage legally on the basis of contested moral views regarding same-sex activity.”\(^{241}\) Brake agrees, but argues that such advocates have “failed to follow the implications of such neutral or political liberal reasoning to the extreme conclusion” where we question marriage itself.\(^{242}\)

While Brake’s argument is grounded in political theory, it has resonance as a matter of constitutional law or so this Article has argued. There is indeed a constitutionally slippery slope,\(^{243}\) at least with regards to certain constitutional objections to bans on same-sex marriage, from same-sex marriage to the very disestablishment of marriage. The dissenting opinion in Goodridge speaks to this tension reasoning that:

the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized.\(^{244}\)

But Goodridge along with Schwarzenegger and other such cases reject this line of reasoning. The justifications from tradition, begetting children, and preserving an allegedly crucial institution of civil society all fail in rendering prohibitions on same-sex marriage constitutional. These rationales are constitutionally inadmissible or simply proffered in bad faith. But to now invoke them to defend marriage itself is hypocritical. It stands to validate those reasons that the state routinely invokes to limit marriage just to opposite sex couples. We

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\(^{241}\) Brake, supra note 53, at 133.

\(^{242}\) Brake, supra note 53, at 135.

\(^{243}\) See generally Eugene Volokh, The Mechanisms of the Slippery Slope, 116 HARV. L. REV. 1026 (2003) (arguing that one such slippery slope is the idea that if the Court bases its decision on a particular principle, that principle may suggest that other laws and policies are unconstitutional). See also supra note 53.

\(^{244}\) Goodridge at 381, dissenting
Disestablishment of Marriage

cannot have it both ways. Either prohibitions on same-sex marriage are unconstitutional along with marriage itself or marriage is constitutional along with prohibitions on same-sex marriage.